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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 379.

L. H. HYER, PETITIONER,

vs.

THE RICHMOND TRACTION COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FILED MAY 22, 1897.

CERTIORARI AND RETURN FILED JUNE 15, 1897.

(16,592.)

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(16,592.)

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TRANSCRIPT OF RECORD.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND
FOR THE EASTERN DISTRICT OF VIRGINIA.

L. H. Hyer, Complainant,	}	In Equity.
<i>vs.</i>		
Richmond Traction Company and others, Defendants.		

Be it remembered that heretofore, to-wit: on the 30th day of October, 1895, came L. H. Hyer, the complainant in the above-styled cause, and filed his bill of complaint against the Richmond Traction Company and others, which said bill is in the words and figures following—to-wit:

BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
(2) EASTERN DISTRICT OF VIRGINIA.

Hyer	}
<i>v.</i>	
Richmond Traction Company and others.	

(3) ORIGINAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
EASTERN DISTRICT OF VIRGINIA, IN THE
FOURTH JUDICIAL CIRCUIT.

L. H. Hyer, Plaintiff,	}
<i>vs.</i>	
The Richmond Traction Company, a corporation chartered under the laws of the State of Virginia; John W. Midendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Shield, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton, and Louis Euker, Defendants.	}

To the Honorable Judges of the Circuit Court of the
United States of the Eastern District of Virginia:

L. H. Hyer, a citizen of the State of Missouri, residing in Warrensburg, Johnson county, in the State of Missouri, brings this bill against the Richmond Traction Company, a corporation chartered under the laws of the State of Virginia, a citizen of the State of Virginia, having its residence or chief place of business in the City of Richmond, Virginia; Jno. W. Middendorf, residing in the City of Baltimore, in the State of Maryland, a citizen of the State of Maryland, and John L. Williams, John S. Williams, Everett (4) Waddey, R. Shereffs, P. B. Shield, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, and Louis Euker, residing in the City of Richmond, in the State of Virginia, and citizens of the State of Virginia, Charles T. Child, residing in the County of Hanover, in the State of Virginia, a citizen of the State of Virginia, and Edmund Pendleton, residing in the County of Henrico, in the State of Virginia, a citizen of the State of Virginia.

And thereupon your orator complains and says as follows:

That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars (\$2,000.00); indeed vastly exceeds said sum or value.

II.

INDUCEMENT.

Your orator respectfully sheweth unto your honors, that he is by profession a civil engineer, and has for some years past been engaged in projecting and constructing street railways in various cities of the United States, being sometimes called to inspect and report upon fields for such enterprises, and again, himself calling the attention of capitalists and investors to what he considered favorable fields for investments in such directions.

For some years past your orator has had his attention more and more directed to Broad street and connecting streets in the City of Richmond, Va., as an attractive and promising field for a street railway; and, having secured the co-operation or assurance of adequate capital, he, last spring, made application to the Council of the City of Richmond for an appropriate franchise which—after repeated visits to the city, prolonged and arduous efforts, and the expenditure of a large sum, in traveling, hotel bills, counsel fees and other expenses—he succeeded in securing—(5) the sum so expended being between three thousand five hundred dollars (\$3,500.00) and four thousand dollars (\$4,000.00).

III.

RICHMOND CONDUIT CO.

This franchise, which passed both branches of the City Council, was approved by the Mayor on the 17th day of June, 1895, and was granted to your orator and his associates under the name and style of the "Richmond Conduit Railway Company." After the franchise had thus become a law, it was discovered that its terms, as originally prepared and submitted by your orator and recommended by the Committee on Streets, had been altered, without the approval of your orator, who declined to accept or to proceed under it in the form in which it was finally enacted and approved. Upon conference, however, with prominent officials of the city and members of the City Council, your orator was assured that the changes made in the paper had been made under the supposition or representation that they would be acceptable to him and that, as this proved not to be the case, amendments could and would be passed restoring the franchise to its original form; provided, your orator could and would procure the deposit by a certain date, in one of the banks of the city of Richmond, of the sum of \$10,000, upon conditions embodied in a paper to be prepared by the City Attorney. Your orator, therefore, on the 17th day of July, just one month after the ordinance had become a law, caused the deposit of \$10,000 to be made in the State Bank of Virginia, and then left the city and went North for conference with his associates and backers. He had given substantial and satisfactory guarantee, indeed precisely the guarantee required, of the good faith of himself and associates of the Richmond Conduit Railway Company and their earnest purpose to build the road; such guarantee moreover, as he was assured would induce the City Council to pass the proposed amendments to his franchise, restoring it to its original and approved form.

IV.

RICHMOND TRACTION CO.

During his visits to Richmond and conferences with Council Committees, with regard to his conduit ordinance, your orator became aware of the existence of a competing applicant before the City Council, and of the efforts of a rival and competitor for the control of the Broad street franchise, that certain parties were seeking to procure the grant of this franchise to them, under the name and style of the "Richmond Traction Company." But these par-

ties appeared to be without money or resources or influence, and did not seem likely to accomplish anything, except, perhaps, to embarrass your orator in the premises. One P. B. Sheild, an attorney at law of the city, appeared to be at the head of this movement, or at least in charge of it before the City Council and its committees; but though your orator several times saw him and his associates, he and Mr. Sheild were not introduced to each other, and, so far as your orator knows, no efforts were made on either side to open communication between these two competitors for the Broad street franchise up to the meeting of your orator and Mr. Sheild in New York, as hereinafter set out, on the 9th day August, 1895.

Indeed, prior and up to this day, your orator very naturally regarded himself and associates of the Richmond Conduit Railway Company as having altogether the inside track in the premises. His ordinance had passed both houses of the City Council and been approved by the Mayor, and though not at the time in a shape satisfactory to him, yet he had been assured and had every reason to (7) believe that it would be put in this shape; indeed, he had given the guarantee required to make this practically certain, and the Committee on Streets had actually reported or recommended the most important of the desired amendments and that without hesitation or difficulty. Thus your orator and his associates of the Richmond Conduit Railway Company appeared to be, indeed were, masters of the situation.

V.

THE ALLIANCE.

During the early part of August, 1895, your orator was in the city of New York engaged in perfecting his arrangements for prompt and vigorous action under his conduit ordinance, as soon as it should be satisfactorily amended. On the morning of the 9th of August, when your orator entered the banking house of Stewart & Co., No. 40 Wall street, who had been advising with him, with a view of aiding and backing him financially in the prosecution of his enterprise, he was informed that Mr. P. B. Sheild, above mentioned, had been brought by his broker to Stewart & Co., that he had proposed to them to aid and back him in the prosecution of his Richmond Traction Company scheme; that indeed he was at that moment in another apartment of the banking house in conference with Mr. S. H. G. Stewart, the head of the firm. During the day Mr. Stewart had several interviews with the said Sheild and your orator separately. Mr. Stewart advised

your orator to the effect that the Richmond Traction people, or those acting under that style or proposing to have that corporate name, were at his mercy ; that said Sheild had distinctly admitted this to him (Stewart) and had plead with him (Stewart) to get the promoters of the Richmond Traction scheme recognition in the organization of the Conduit Company, the said Sheild clearly and emphatically declaring that he desired to meet your orator for the purpose, if possible, of consolidating the interests of the Traction people, or those representing that interest, with those of the Conduit Company. The pleading for recognition and anxiety for a meeting was earnest and came from the Traction people and the said P. B. Sheild and associates, acting through the said P. B. Sheild, who declared that he had full power and authority in the premises to represent and speak for each and all of them. The said Stewart then advised your orator that rivalry between the Conduit Company and your orator and his associates, on the one hand, and the Traction people and the said P. B. Sheild and his associates on the other hand, and antagonism of this character, would probably result in the defeat of both their schemes, or the passage of the franchise in favor of one of the two competitors loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise, and he therefore urged your orator to shake hands with said Sheild, to unite forces with him upon one of the two ordinances—the Conduit ordinance or the Traction ordinance, and thus to secure and share the fruits of victory instead of the disappointment and bitterness of defeat. Mr. Sheild and your orator, realizing the wisdom of this council, were then and there introduced by Mr. Stewart, and, after some conference, parted to meet later at your orator's hotel, having arrived at a general agreement that the promoters of the Conduit scheme, represented by your orator, and the promoters of the Traction scheme, represented by the said Sheild, cooperate and share equally in the profits of the enterprise.

VI.

THE CONTRACT.

The late rivals, now allies, met, as arranged, in your orator's room in the Grand Hotel, about 5 o'clock in the evening, and, in that room and in the lobby, freely and fully conferred. The result of this conference was embodied in a contract which took the form of a joint letter from your orator and the said Sheild to S. H. G. Stewart, herein above mentioned, which letter is in the words and figures following, to-wit :

New York, August 9th, 1895.

S. H. G. Stewart, Esq. :
40 Wall street, city.

Dear Sir :

We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Shield, of Richmond, Va., have this day entered into the following agreement : That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement : That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895 ; and further, it is agreed that the application and franchise to be presented to the Common Council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

(10) Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

Yours very respectfully,

(Signed) L. H. HYER.

(Signed) PHIL. B. SHEILD.

It will be observed that in entering into this contract your orator was acting in behalf of himself and associates, and the said Shield in behalf of himself and associates. At the time your orator was authorized to represent, and did represent, all the parties interested in the Conduit Company's scheme, and the said Shield stated that he had power of attorney from all the parties interested in the Traction Company's scheme.

Not only does the letter above set out embody the express contract between these parties, legally unalterable by parol evidence, but, in point of fact, this contract was first written by the said Sheild; then suggestions were made by your orator, and, perhaps, by the said Sheild also; then the paper, as thus amended, was rewritten by Sheild, and, lastly, as rewritten, it was read by an acquaintance of your orator who was present, and both contracting parties, being questioned by him, not only stated that the contract was thoroughly understood by them, but each showed his thorough understanding and comprehension of it—the said Sheild stating substantially that it was an agreement providing for a consolidation of interests and equal share of profits, each party being first repaid all actual outlay and expenses; that Mr. Hyer was to withdraw his Conduit franchise, and he (Sheild) acting in behalf of himself and associates, was to substitute therefor his Traction franchise, and that Mr. Hyer was to keep the \$10,000 in Richmond until the 17th day of August, 1895.

(11)

VII.

FULFILLMENT AND NOTICE.

Clearly, then, said Sheild understood the contract between him and your orator, and your orator now states and charges that he understood it precisely as Sheild did, and not only so, but he performed his part of it in fullest measure. Said Sheild and his Traction Company associates, as will more fully appear below, have gotten all they bargained for from your orator, indeed, all they said they wanted, and it is easy to see what that was and how vital to them.

At the end of July they well knew, and no one knew better than Sheild himself, that the Conduit Company held the field, and the Traction Company had no position and no prospects. Having failed with the City Council and the Street Committee, Sheild saw that his only chance was to attach his traction bubble to the tail of the conduit kite, and to do this promptly before the bubble burst. The conduit people had the Street Committee; they had the ear of the Council, and they had \$10,000 on deposit in Richmond. If Sheild, for his traction people, could but get the conduit franchise out of the way, get the use, the benefit or the credit of their \$10,000, and also get the conduit workers, who seemed to have the ear of the Council, committed to the traction scheme, the field was won; otherwise, there was no chance. There was but one way to accomplish these ends, viz.: to embarrass as much as possi-

ble the progress of the conduit scheme, and to promise everything to its promoters if they would agree to the substitution of the Traction ordinance in place of theirs; and this way was adopted. How doubly well it succeeded, your orator is mortified now to realize.

Immediately after the contract of August 9th was executed, and at the same interview at which it was executed, (12) said Sheild expressed his fears that he would not be able to rally your orator's friends in Richmond to the hearty support of the traction scheme without some assurance to them, in addition to his mere signature to the contract, that your orator desired them actually to go to work to secure the passage of the substituted ordinance. At the request of said Sheild, your orator, therefore, endorsed, upon a draft of his Traction ordinance which he presented, a request or direction to his friends in Richmond to give it their hearty support.

Again, at this same interview, said Sheild asked your orator what names of his associates should be inserted in the Traction ordinance. He insisted that he must have your orator's name, and he also desired to use the names of one or two of his associates whom he specified. Your orator could not, at that moment, give definite instructions, but the next day he wired his friends in Richmond, whither Sheild had returned, desiring them to see him, and to have inserted in the Traction ordinance your orator's name and the names of one or two of his friends and associates, one of whom was at the time in Richmond, and was, up to that moment, at work upon his conduit scheme, but who, with your orator's entire working force, went over at once to the traction side openly and heartily, though some of them even then thought, as all now see, that this change of front was a mistake.

Yet, once more: agreeably to the contract of August 9th, the Conduit ordinance was publicly withdrawn before the Street Committee in the presence of workers from both sides, and particularly of some from the traction side said not to have been represented by Sheild in making the contract, but who are now prominent, personally and officially, in the traction enterprise and company. For a day or two subsequent to the signing of the contract, Sheild and company several times wired your orator as to sundry details of the joint enterprise, especially urging him, by (13) all means, to see that the \$10,000.00, on deposit in Richmond, should be detained there until the meeting of the Council—an indispensable service which your orator rendered, although not at the time having received the telegrams referred to. And not only so, but, being him-

self prevented by sickness from being present in Richmond, your orator's friends and associates in that city continued in good faith to work with the traction people and for the passage of their ordinance, some of them actually up to the very day the Board of Aldermen finally concurred in the ordinance as passed by the lower house.

Your orator now charges that all promoters of the traction scheme, who were interested in it at the date of the contract with Sheild, are *clearly bound* thereby. Said Sheild stated that he had power of attorney from each and every one of them; they put him forward, and he acted for them; they took the benefit, and they must yield the consideration.

But your orator is also further advised and charges that all who have come into the Traction Company since that date are likewise bound, for they, too, are benefited by the consideration your orator gave, and, if they had not full personal knowledge, as some of them undoubtedly and all along had, they certainly *had legal notice* of your orator's rights. They knew enough to put them upon inquiry. Indeed, they either knew or they deliberately refused to know anything and everything with regard to your orator's rights and interests in the joint enterprise.

VIII.

BREAKING FAITH.

Your orator is at a loss to comprehend or even fully to realize the next chapter in this history. As above intimated, after executing the agreement of August 9th, he was detained one day in New York in perfecting his preparations for vigorous prosecution of the joint enterprise, and after that in Washington by serious and continuous illness. Hearing nothing from Richmond after Sheild's return there, the telegrams above mentioned not having reached him, about the 13th of August, the day before the Council was to meet to consider the Broad-street franchise, your orator requested his associate, Wm. H. Duchay, to go at once to Richmond and find out what this silence meant. This said Duchay did, arriving in this city on the 14th, the very day of the Council meeting, and immediately interviewed Sheild, but without eliciting either explanation of his silence or satisfactory declaration as to his attitude and purposes toward your orator. While no intimation was given of a purpose to break faith with him, or to crowd him out, yet the situation was not satisfactory, and your orator was promptly so informed.

The Traction ordinance was duly passed by the Coun-

eil, and Duehay being compelled to return to Washington, Sheild promised to write him fully, but did not do so, and said Duehay wired, and your orator both wired and wrote him for explanation and information, offering also to come to Richmond if vitally necessary; but neither your orator nor Duehay received any reply. Meanwhile, his friends in Richmond wrote your orator that something was wrong, and that they could get no definite information as to what was going on.

Finally, on or about the 23d of August, certainly as soon as he was well able to travel, your orator arrived in Richmond, communicating in advance with his friends to arrange a conference with Sheild, sending him word immediately upon reaching the city as to his whereabouts, and expressing a willingness to meet any appointment he might make. Sheild at first said he was too busy to make an appointment, but came in the evening to Ford's Hotel, where your orator was putting up, bringing with him one W. F. Jenkins, who had originally been associated with (15) and represented by your orator, but who seemed then to be, and is believed now to be, arrayed with said Sheild against him.

IX.

OPEN RUPTURE AND LINES DRAWN.

The conference took place about 5 or 6 P. M., not in the hotel, but on the steps of the City Hall opposite; and in the course of the interview your orator forced said Sheild to declare himself. He then openly admitted that "he had made other arrangements;" in other words, he had dropped your orator and his associates.

It is important to note that this was the first communication your orator had received from Sheild since the execution of the contract, on August 9th; that it was the first intimation received from him, or from any one on his side, that it was not his purpose to carry out said contract in good faith, and that this intimation was given nearly ten days after the Council had passed the Traction ordinance, and passed it under the circumstances above detailed, and only three days before the Board of Aldermen concurred in this action. Repudiation of such obligations at such time and under such circumstances, struck your orator dumb with amazement, yet not quite so dumb that he did not find words to express his opinion of such treatment.

Your orator was yet far from well. He had not been able to confer with his former friends in Richmond, and

did not know to what extent they had deserted him or been bought off from him. Nor does he know this even now, though it is abundantly clear that some of them have been taken care of. As above stated, the Council had acted, and the Aldermen were evidently about to concur in their action. Your orator has been deserted by some of his friends, and had little time or opportunity for conference with others. But the crisis was upon him, and whatever was to be done must be done quickly.

(16) Sheild, however, did make one suggestion that seemed not utterly devoid of promise, and which, therefore, required delay. He stated that he would call a meeting of his associates at a given hour the next morning, Saturday, the 24th of August, and it would then be finally determined what settlement, if any, they would offer. Accordingly your orator held his hands, awaiting the event; but the meeting was not held at the appointed hour, nor at a subsequent hour to which it was said to have been postponed.

When this last faint prospect of just treatment had faded absolutely away, there appeared to be but one thing remaining to your orator, and that was to give such notice as he then could of his rights and claims; such notice as would be most likely, in the brief time intervening, to reach the unknown parties, if any, who had become interested in the Traction enterprise since the 9th of August, the date of the contract at the Grand Hotel. This your orator did, by publishing in the State newspaper on Monday, the 26th of August, the very day the Aldermen acted, a statement in the words and figures following, to-wit:

" Mr. Hyer's Charges.

DISAGREEMENT AMONGST THE TRACTION COMPANY'S PEOPLE.—THREATENS TO BRING SUIT.

Mr. L. H. Hyer, one of the interested parties of the Richmond Conduit Company, and the fully authorized attorney and agent of that company, was seen by a reporter of the State and was asked if he was interested in the present Traction Company's franchise, now before the Board of Aldermen. To which he replied that he had a contract with the Traction Company for one-half interest of their franchise, when such franchise was granted.

What is the consideration of this contract you hold?

(17) I was to cause the withdrawal of the Richmond Conduit Company's application for franchise in favor of the Traction Company, which was done in due form before the

Street Committee. There are a few other minor details, all of which have been complied with.

Is the Traction Company under contract with anyone else?

I am reliably informed they are.

What do you know of these other contracts?

One is with Stewart & Co., bankers, No. 40 Wall street, New York, who, I am informed, hold a binding proposition for one-third interest in the franchise, and I have reason to believe that an effort will be made on the part of Stewart & Co. to hold the Traction Company to this proposition. I am also informed that on the 19th of August a contract was entered into with W. F. Jenkins, the terms of which, it is said, are that he is to have about one-half interest in the franchise for his services in securing the said franchise. It has also been stated to me that the company has agreed to turn over to certain bankers of this city the greater portion of this franchise for financing the same.

What is your idea of the outcome of these complications?

I can only answer for my associates and myself. If the Board of Aldermen pass the franchise to-night, as I hope and believe they will, it is my intention to retain able counsel before leaving the city to prevent any further transaction on the part of the Traction Company, from bond or stock transfers, until they have complied with the terms of the contract.

I should infer from the above that there is lack of harmony in the Traction Company.

My impression is that all of these conflicting contracts have caused discord among the parties at interest, and I am afraid these complications will lead to litigation which (18) will prove fatal to the enterprise, which I will regret to see with my financial interests at stake.

I have just received a telegram from Stewart & Co., of 40 Wall street, New York, saying they have a binding contract, dated August 9th."

Your orator is now able to say that, before the Traction franchise became a law, this publication undoubtedly reached the parties whom it was most important to affect, with notice of his rights; for the gentleman who is now president of that company, to-wit: John S. Williams, Esq., not only read your orator's card, but answered it in the public prints by a statement which evidenced the fullest notice of his claims, while almost contemptuously denying their validity, a statement which, as it seems to your ora-

tor, not only forever closes the mouth of the Traction Company on the subject of *notice*, but well illustrates the recklessness and violence with which claims such as are set out in this bill may be characterized by young gentlemen in too hot haste to score *success* to waste time in that patient hearing and careful investigation unavoidable by him who would do *justice*. The following is the statement referred to :

MR. HYER ANSWERED.

Commenting on Mr. Hyer's statement in last evening State, Mr. John Skelton Williams said :

"I never heard of Mr. Hyer until he came out in last evening's *State* with those preposterous statements. I immediately took the matter in hand to see whether there was the slightest foundation for them, and was not long in satisfying myself that his claims could not be sustained ; that his action was based on the flimsiest assumptions, and was probably inspired by the enemies of the Traction Company, who hoped to spring this surprise last evening at a critical time, with the object of casting doubts upon (19) the plans and purposes of the Richmond Traction Company. His statements are not worthy of any attention.

"Will his threat of employing counsel to defend his rights in the matter interfere in any way with your plans ?" was asked Mr. Williams. "Not in the slightest degree," he replied. "It may really be said we have already begun our work, that is to say, the office work, the engineering work. The preparation of plans, and so forth, is already now well under way, and very soon after the Mayor attaches his name to the ordinance, and it becomes a law, the actual physical construction of the road will be at once begun, and pushed to completion much more rapidly than the time allowed in our franchise. We shall pay no more attention to Mr. Hyer than we would to some unconcerned and disinterested person who might appear on the scene now for the first time and request a gratuitous interest in our enterprise."

(From the State of August 27th, 1895.)

(20) These publications your orator followed up by serving upon every one named in the Traction Company's ordinance, as passed by both houses of the City Council and approved by the Mayor (a copy of which as published, is herewith filed, marked Exhibit "A," and prayed to be read and taken as part hereof), formal notice in words and figures following, to-wit :

Richmond, Va., September 3d, 1895.

To John W. Middendorf, John L. Williams, Everett Waddey, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins, and through them, to each and every party, who on or since the ninth day of August, 1895, has been associated with them, or with any or with either of them, in the premises.

Take notice, that L. H. Hyer, in behalf of himself and associates, claims to be entitled to a full one-half interest in the franchise recently granted by the City Council of the city of Richmond, Virginia, to Jno. W. Middendorf, John L. Williams, Everett Waddey, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins and associates, to build and operate an electric street-car line in the said city, on Broad and other streets—said interest being claimed under a contract bearing date August ninth, 1895, entered into between P. B. Sheild and associates, through P. B. Sheild, and L. H. Hyer, in behalf of himself and associates—one original of which is in the hands of said P. B. Sheild and one is in the hands of Stiles & Holliday, attorneys at law, 1014 east Main St., Richmond, Virginia, the latter being open to your inspection; and, if the rights of the said L. H. Hyer and associates are not recognized and conceded, that they intend forthwith to apply to the courts to enforce their rights in the premises.

(21) This formal notice is not intended as an implication or even admission that you have not all along been aware of the rights and claims above asserted.

L. H. HYER.

By STILES & HOLLADAY,

Attorneys.

Your orator has already stated to the court that when he entered into the contract of August 9th with Sheild and associates, he did so on behalf of himself and associates—the promoters of the Richmond Conduit Railway Company's scheme. He deems it proper to state that since that date, all his then associates, with the exception of said W. F. Jenkins, A. B. Guigon, Edmund Pendleton and Louis Euker—the last three of whom required your orator to execute a paper recognizing the said Jenkins as trustee and representative of their rights and interests in the enterprise—have made legal transfer and assignment of their rights and interests in the premises to him; so that, with the exception just above mentioned and just below considered, your orator, in his own right and be-

half, now controls, represents, embodies and respectfully presses before the court the right in law and equity to everything which said contract of August 9th assured to all the promoters of the conduit scheme, to-wit: a full one-half interest therein and thereunder. He deems it proper also to add that all his said assignors, at the date of said contract, and at the dates of their respective assignments to him, and at the date of the institution of this suit, were and that they still are, citizens of States of this Union other than the State of Virginia.

As to the rights and interests, at the date of said contract with Sheild, vested in W. F. Jenkins and W. F. Jenkins, trustee, your orator now distinctly states and charges that said rights and interests are not only comparatively insignificant, but that they have no longer any legal or valid existence, as against or in diminution of the (22) rights and interests of your orator. First, because, as he believes and charges, said Jenkins has abandoned said rights and interests and makes no claim to them. Not seeing how it was possible under the circumstances that he could make such claim, your orator, prior to the institution of this suit and with a view thereto, addressed and delivered to said Jenkins a communication in the words and figures following, to-wit:

ROBERT STILES.

ADDISON L. HOLLIDAY,

Late Judge Chancery Court of Richmond.

Law Office of

STILES & HOLLADAY,

1014 E. Main Street.

Richmond, Va., Sept. 18th, 1895.

W. F. Jenkins, Esq., City.

Dear Sir—As counsel for L. H. Hyer we write to ask whether you claim any rights of any character under the paper handed you as trustee by L. H. Hyer on the 17th day of July, 1895. If you assert any claim of any character under this paper, please furnish us with a copy of the same or name an early time and place when and where we can meet you and read the paper in question.

Yours truly,

(Signed) STILES & HOLLADAY.

To this communication your orator has received no reply; but he now goes further and charges that, even if said Jenkins should advance such claim, it would be mani-

festly inconsistent, null and void, said Jenkins being not only one of the incorporators of the Richmond Traction Company, but having thoroughly cast his lot with said Sheild and his traction people whose entire position is (23) based upon the repudiation and denial of any and all right or claim in your orator or those represented by him in the contract of August 9th.

And now, in conclusion and upon the basis of the foregoing recital of facts, your orator distinctly claims and charges, and repeats the claim and charge, that he is fairly and justly entitled to a full one-half interest in the Traction Company's enterprise and franchise, that he has been unfairly and unjustly defrauded of the same, and that he will be exposed to irreparable injury, unless the court, by its benevolent writ of injunction, shall interfere to prevent said franchise or any part thereof from being assigned, transferred or encumbered to, or in favor of, innocent parties unaffected with notice of his rights.

For as much, therefore, as your orator is remediless save in a Court of Equity where such wrongs are properly cognizable and relieveable, he prays that the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton and Louis Euker be made parties defendant to this bill and required to answer the same, but answer under oath from each and every one of said defendants is hereby expressly waived; that, if it shall be ascertained during the progress of this cause, that the said Shield represented other persons who have not been made parties defendant to this bill, then such other persons, when their names shall be discovered, be also made parties defendant hereto and required to answer this bill, but oath to said answers and to each and every one of them is also expressly waived; that each and all of said parties defendant, their agents and servants, be enjoined and restrained from transferring or encumbering the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said company, or in any other way borrowing money for the use of said company upon its franchise or property; that your orator may (24) be decreed by this honorable court to have valid right and claim to a full one-half interest in and under said contract of August 9th; and, upon the basis of said contract, to have such right and claim to a full one half interest in the said Richmond Traction Company's franchise, enterprise, property and stock; that specific execu-

tion of said contract be decreed your orator and enforced under the power and process of the court; that all parties defendant be required and compelled by the process of the court to do and perform every act which may be requisite and necessary to the vesting of your orator's full rights in the premises; and that your orator may have such other, further, general and complete relief as may be agreeable to equity and the nature of his case; and also that a writ of subpoena issue out of and under the seal of this honorable court directed to the said defendants, the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton and Louis Euker, commanding it and them and each of them upon a certain date therein named to be and appear in this honorable court and there to answer all and singular the premises and to abide by and perform such order and decree as may be entered by the court in the cause, but answer under oath from each and all of the said defendants is hereby waived. And your orator, as in duty bound, will ever pray, etc.

(Signed) L. H. HYER.

STILES & HOLLADAY,

Solicitors for Complainant.

(25)

EXHIBIT "A" WITH BILL.

An Ordinance to Authorize the Construction and Operation of a Street Railway Within the Limits of the City of Richmond by the Richmond Traction Company.

Be it ordained by the Council of the City of Richmond :

First. That the Richmond Traction Company, composed of John W. Middendorf, John L. Williams, Everett Waddey, Reuben Sherreffs, Philip B. Sheild, Charles T. Child and W. F. Jenkins, be, and the same is hereby permitted to construct and operate a street railway within the limits of the city, along the following routes, under and subject to the conditions and provisions hereinafter set forth: a double track in Broad street from Thirty-fourth street to Robinson street; a double track in Robinson street from Broad street southwardly to the corporate limits; a double track from Broad street southwardly to Hollywood cemetery, to be located on such streets as may be hereinafter designated by the Committee on Streets; and a single track loop on Church Hill, in Twenty-fifth, O and

Thirtieth streets, or in such other streets as may be hereafter designated by the Committee on Streets.

Second. The said Broad street routes shall be begun within ten days from the date this ordinance takes effect, in a manner satisfactory to the Committee on Streets, and shall be pushed diligently and without interruption or cessation towards conclusion; and the said company shall, within nine months from the date above-mentioned, have their cars in operation upon the said entire routes. All materials to be used and manner of construction shall be subject to the approval of the city engineer, and the work shall be begun and pushed with due diligence on the western end within ten days, and on the eastern end within (26) sixty days from the date this ordinance takes effect. Before beginning said work, and within ten days from the approval of this ordinance, the said company shall deposit with the treasurer of the city bonds issued by the city of Richmond of the face value of ten thousand dollars, or United States currency for that amount, to be held subject to the following provisions, viz.:

That should the said company fail to begin said work in a manner satisfactory to the said committee within the ten days above specified, or fail to complete the same in a manner satisfactory to said committee within the nine months above specified, then, in either event, the said bond or bonds or currency shall become and be the absolute property of the city by and with the consent of the depositor thereof, given and expressed by the deposit of the same under this ordinance. Should the said company fail to begin said work in a manner satisfactory to said committee, or should the said company fail within the said nine months to have their cars in operation upon the said entire route, or should the said company, after having begun said work, fail to prosecute the work in a proper manner and with due diligence to the satisfaction of the Committee on Streets, or should, in the judgment of the said committee, continue for ten days in such improper prosecution, after having been notified by the said committee to push the work more rapidly and satisfactorily, then each and every one of the privileges hereby granted shall cease and all the privileges hereby granted and all the tracks laid in said streets shall revert and belong to the said city, by and with the full consent of the said company, given the acceptance of this ordinance in proceeding to exercise any of the privileges herein given.

Third. The said Richmond Traction Company shall, upon each day and night, between 6 o'clock A. M. and 12

o'clock P. M., or later whenever required by the City Council, render fair service to the public upon the said routes, and shall not at any time within said hours (27) cease so to do, as to the said routes, or any part of the same, without the consent of the City Council by ordinance. As a part of the undertaking by said company to render fair service, as above mentioned, the said company is to run its cars upon the Broad-street route above described upon such schedule or schedules that some one of its cars, both in going to and returning from its different termini, shall pass each point upon the said route, between Thirty-fourth and Lombardy streets at least every five minutes; but the Committee on Streets are to have the power to require from time to time that the company shall furnish quicker service, and the service on the lateral routes shall be such as the Committee on Streets may from time to time determine. The said company also shall at all times keep its cars and tracks in proper repair and its cars in neat condition.

The said company shall start at least two cars from Thirty-fourth street and from Robinson street in each direction at 6 o'clock every morning, and from the southern end of its lateral routes. Upon complaint made at any time to said company by the Committee on Streets that such fair service is not being rendered, or that its car or cars and tracks are not in proper repair, or its cars in neat condition, the said company shall, within ten days after receipt of such notice, rectify and remove the ground, or grounds, of said complaint and fully satisfy the said committee that thereafter fair and satisfactory service will be so rendered, and that its car or cars and tracks will be kept in proper repair and its cars in neat condition, and shall equip said cars with a fender or other life-saving appliances as shall be approved by the Committee on Streets. Should the said company fail within the said ten days to rectify and remove said grounds of complaint to the satisfaction of the said committee, it shall be liable for such failure to a fine of not less than ten nor more than one hundred dollars, each day's failure to be a separate offence. Should the said company fail, unless it is in the opinion (28) of the committee temporarily prevented by some unforeseen, extraordinary and impersonal cause within said ten days so to rectify and remove said grounds of complaint, and satisfy the said committee that thereafter fair and satisfactory service will be so rendered, and that its car or cars and tracks will be kept in proper repair and its cars in neat condition, then the said committee may, if it deem proper, notify said company not to run any car or

cars upon any such part of its track or tracks as to which complaint is made until authorized by the said committee or the City Council. Should the said company, at any time after forty-eight hours from the receipt of such notice from the committee not to run its car or cars, run or operate upon the said route, or any part of the same, any one or more of its cars, it shall be liable to a fine of not less than ten nor more than one hundred dollars for each and every car so run, each day's running of any such car to be a separate offence.

Fourth. The said company, in laying the tracks upon the routes above described along said streets, shall follow the locations and grades to be designated by the City Engineer, restore all streets and pavements and regrade all earth taken up or disturbed in said construction; and shall at all times, under the supervision of the Engineer of the city, at its own expense and charge, keep the streets and pavements upon which said tracks are laid to the extent of the portion of said street between the rails of each track and between the tracks, and for two feet on each side beyond the outside of said tracks, in good and complete repair, and shall pave and repair and repave the same in such manner and with such material as the city may from time to time pave, repair and repave the remaining portion of said streets. In having such paving, repairing or repaving done the said company shall have it executed by such contractor as the city may employ to do the remaining portion of the streets, provided such contractor will agree with said company to do such work at a charge (29) or cost not in excess of what he may charge the city for the said work done on the remaining portions of said streets. All rails and other materials used in the construction, repairing and relaying of the tracks upon said route shall be such as are satisfactory to the City Engineer, and the manner of construction shall be so satisfactory. And the said company shall at all times grade the said streets to the same width, as above stated, in accordance with such grades as the Council may from time to time adopt for said streets, and shall at all times repair any portion of its road along said streets, or renew the materials thereof, whenever directed by the Committee or Streets. Should the company fail to perform any of the duties and obligations above imposed in this section for ten days after the receipt of a written notice from the City Engineer of the necessity of such performance, then the said company shall be liable to a fine of not less than ten nor more than fifty dollars, each day's failure to be a separate offence. The

City Council may forbid the running of any car or cars upon the route of said company along said streets until the requirements shall be fully complied with. The City Engineer, whenever directed by said committee, is hereby authorized, in all cases of failure to perform such duties and obligations, to have such streets paved, repaired, repaved or graded to the extent required of said company as above set forth, and said road repaired or materials renewed, and the expense thereof shall be a debt against the company recoverable as debts are now recoverable by the city of Richmond, and the said debts shall be a lien upon the tracks of said company prior to any other lien or encumbrance upon said tracks. But the said company hereby agrees that as long as any such debt shall remain due and unpaid it will not run any one or more of its cars along the said route. Should the said company, while any such debt shall remain due and unpaid, run or operate upon its said route any one or more of its said cars, it shall (30) be liable to a fine of not less than ten nor more than one hundred dollars for each and every car so run, each day's running of any such car to be a separate offence.

Fifth. The said company may operate its cars along said routes by electricity or such other motive power, except steam, as may be hereafter authorized by the City Council, but such permission to use electricity shall be subject to each and every restriction and condition heretofore imposed by the City Council upon any one or more of the street railway companies using electricity as a motive power in this city, except as herein otherwise provided; and for the failure of the said company to perform any one or more of said restrictions or conditions, it shall be liable to a fine of not less than ten nor more than one hundred dollars, each day's failure to be a separate offence. The city hereby expressly reserves the right to revoke at any time the right or permission to use electricity as a motive power, or to put any further conditions, restrictions and regulations as to the use of electricity.

Sixth. The gauge of all the tracks of said company within the corporate limits of the city of Richmond shall be the same as that of the present tracks of the Richmond City Railway Company, subject to the right of the Council hereafter to require its change.

Seventh. The privileges herein granted are given upon the further express condition that the said company shall permit any other company or companies, when authorized by the Council, to use, in whole or in part, the above

described routes or lines upon such fair and reasonable terms as may be agreed upon by the said company and each entering company ; but no company shall be entitled to demand or receive the privilege unless it shall concede to the Richmond Traction Company the right to run over the tracks of such entering company, under terms determined by similar arbitration as to compensation ; provided, however, that a company not using the same motive power shall not be allowed to use, on the above mentioned route, (31) more than three squares on said route, and in the event that the said companies cannot agree upon such terms, the same shall be settled by three disinterested persons, one to be selected by the Richmond Traction Company and one by the company desiring to enter, and the third by the two persons so selected, and the terms and conditions which shall be fixed and determined by said persons, or a majority of them, shall be the terms and conditions upon which said company or companies, respectively, shall use and occupy said tracks. If the said Richmond Traction Company shall, for thirty days after having been requested in writing to appoint its representative, fail to make such appointment, then the City Engineer shall make such appointment, and the person so appointed shall have the powers he would had if he had been appointed by the said company. If the said arbitrafors appointed in either of the manners above mentioned shall, after considering for sixty days the matters submitted to them, fail to arrive at and agree upon the terms and conditions to be imposed, and shall also fail to select an umpire to settle and determine said terms and conditions, then the City Engineer shall select such umpire, and the umpire so selected shall have the powers he would have had if he had been appointed by the said two arbitrators. Should either the above named company, or any company that may, under this section, enter upon and use the tracks of the above named company, fail to keep and perform each and every one of the terms as to the use of the said tracks, the said company so failing shall be liable to a fine of \$100 for such failure, each day's failure to be a separate offence ; and for any such failure the City Council may forbid the running of any car or cars of the company so failing, upon any of the tracks as to which said terms apply, until said committee shall be fully satisfied that said term or terms will be fully complied with. Should the said company at any time after twelve hours from the receipt of notice of (32) such forbiddance, run or operate upon said tracks any one or more of its cars, it shall be liable to a fine of not less than ten nor more than one hundred dollars as to

each and every car so run, each day's running of any such car to be a separate offence. No company shall connect with this company except by permission of the City Council, and any company so connecting shall make with the committee satisfactory arrangements as to the transfer of passengers with the said Richmond Traction Company. For any violation of this prohibition the said Traction Company shall be liable to a fine of not less than ten nor more than five hundred dollars, each day of continuance of such connection to be a separate offence.

Eighth. The privileges herein granted said company are granted on the express condition that said company shall not, at any time hereinafter, erect, complete or occupy any power-house, either within or without the city limits, within one hundred yards of a private school, a public school of the city of Richmond, or any place of public worship in said city which shall have been established at the time such power-house shall have been begun to be erected or occupied. For any such violation of this section the said company shall be liable to a fine of not less than ten nor more than one hundred dollars, each day's violation to be a separate offence.

Ninth. The privileges herein granted to said company as to the laying and using of said tracks are given subject to and upon the condition that the said company shall, for the privilege of so using and occupying the streets of the city, and also in satisfaction of all city taxes upon the property of said company, pay annually to the Treasurer of said city an amount equal to 5 per cent. of the entire gross receipts from the freight and passenger traffic of the said company until January 1, 1900. The said sums are to be paid in semi-annual payments on the first day of February and August of each year, the first payment to be made on the first day of February, 1896, upon (33) the said gross receipts of said company for the preceding six months, and are to be accompanied by a statement of the amount of such gross receipts sworn to by the treasurer or secretary of said company. The Auditor of the city of Richmond and the chairman of the Finance Committee, or some accountant duly authorized by them, shall have the privilege to examine the books of the said company every six months in order to verify, or, if need be, correct the returns so made. The Council hereby reserves the power to charge, after the first day of January, 1900, such an annual sum as it may deem fair and proper for the use and occupancy of the streets above named. All payments to be made under this section until the first day

of January, 1900, and all payments that may be required by the Council after the last date mentioned under the power reserved in this section, shall be a lien upon any and all tracks and cars of said company laid or used on the routes above mentioned prior and superior to any other lien or encumbrance upon said tracks or cars. Should the said company fail to make any payment above mentioned within ten days after the same shall become due and payable, the said company shall be liable to a fine of not less than ten nor more than one hundred dollars, each day's failure to be a separate offence. It shall be the duty of the Auditor of the city to have said company summoned before the Police Justice of the city for the imposition of the fine or fines above mentioned. Should the said company continue for thirty days in default as to any such payment, the City Council may require and order said company to cease running any one or more of its cars upon any of the said routes, or any part thereof, until the said payment shall have been made to the city; and should the said company, after forty-eight hours from the receipt of notice of such requirement, and while so continuing in default, run or operate upon the said track any one or more of its cars, it shall be liable to a fine of not less than ten more than one hundred dollars for each and every car (34) so run, each day's running of such car to be a separate offence. Any notice required or authorized under this ordinance may be served upon the company by leaving said notice with any clerk of said company employed at the office of said company within the City of Richmond.

Tenth. The privileges herein granted are granted upon the further condition that the price of transporting passengers to or from any part of its lines or routes in Richmond shall not hereafter exceed five cents for each passenger, but six tickets are to be sold together for not more than twenty-five cents; but if the passenger, without leaving the cars, shall return to any point nearer to that from which he started than a point which he has passed, he shall pay a second fare, unless this be caused by the line of the route over which he is passing being circuitous. And said company shall place on sale, for the accommodation of children going to and from school, tickets at half rates, to be used only between the hours of 8 A. M. and 4 P. M. from Monday to Friday, inclusive; and shall also place on sale tickets at half rate, to be used between the hours of 6 and 7 A. M. from Monday to Saturday, inclusive. And also upon the condition that the Richmond Traction Company

will, without extra charge, receive any and all passengers from any company which the City Council shall hereafter require to receive without extra charge, all passengers from this company. Any person so transferred shall be carried and entitled to all the privileges and benefits to which a person paying his fare to the company to which he shall be transferred would be entitled. If the companies transferring with each other cannot agree upon satisfactory terms, then the terms are to be settled by arbitration in the manner set forth in section seven of this ordinance, and any company violating any such terms shall be liable to a fine of not less ten nor more than five hundred dollars for each violation. If any company shall refuse to give any passenger a proper transfer ticket under (35) said terms, or under the requirements of this ordinance, such company shall for any such refusal be liable to a fine of not less than ten nor more than one hundred dollars.

Eleventh. The said route or line of track, or any part of it, shall not be assigned or leased to any other person or company without the consent of the City Council, nor unless the entire said routes shall be assigned or leased at the same time and to the same assignee or lessee. Nor shall the said company allow any person or other company to use the said route, or any part thereof, without the consent of the City Council. Any lease or assignment, or any permission to use said track in violation of this section shall cause the privileges herein granted to cease, and all the privileges and all the tracks upon said streets shall revert and belong to the said city, by and with the full consent of said company, given by the acceptance of this ordinance in proceeding to exercise any of the privilege, herein given. Any purchaser, assignee or lessee shall be subject to each and every one of the provisions of this ordinance.

Twelfth. The privileges hereby granted shall continue until the first day of January, 1926, unless the same be sooner forfeited.

Thirteenth. That so much of section three, chapter forty-five of the City Ordinances, as would require this ordinance to lie until the next meeting of the branches of the City Council, be and the same is hereby repealed, so far as the same might apply to this ordinance; but all other sections of said chapter, unless otherwise herein provided, and all ordinances requiring the joint use of poles, shall apply and be binding upon the said company as to

this franchise. The privileges herein granted are given upon the further express condition that at any time a viaduct is constructed over Shockoe creek valley from Twelfth to Twenty-third street, or between any intermediate points on Broad, the company shall shift its tracks so as not to interfere with the construction and use of such viaduct, and make all necessary alterations in construction and operation as may be required by the City Engineer and Committee on Streets.

Fourteenth. Said Richmond Traction Co., and all such persons as now compose said company, or who may hereafter unite with them, are, in virtue of the authority vested in the Common Council of Richmond, pursuant to the act of the General Assembly of Virginia, passed March 20, 1860, entitled "An act to authorize the Common Council of Richmond to authorize persons to construct railroads in the streets of said city," declared to be a corporation, and are vested with all the rights and privileges conferred, or intended to be conferred, by said act on persons or companies authorized by said Council of the city of Richmond to construct railroads in the streets of said city, and are likewise bound by all the restrictions of said act.

Fifteenth. The ordinance shall be enforced from its passage.

(Signed) BEN T. AUGUST,
City Clerk.

(The foregoing being a copy of the ordinance as published).

(37) And at another day, to-wit: on the 14th day of November, at a Circuit Court of the United States, in and for the Eastern District of Virginia, held at Richmond, in said District, on the 14th day of November, 1895, the following order was entered, to-wit:

ORDER OF COURT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA, IN THE FOURTH
(38) JUDICIAL CIRCUIT.

L. H. Hyer, Complainant,	} In Equity.
<i>vs.</i>	
Richmond Traction Company and others,	
Defendants.	

On motion of the complainant, L. H. Hyer, by coun-

sel, made in pursuance of Rule 29 of Rules of Practice for the Courts of Equity of the United States, it is ordered that leave be and the same is hereby given the said complainant to amend his bill in the above entitled cause, filed in the clerk's office of this court on the 30th day of October, 1895, by inserting:

On the first page thereof, after the words, "And thereupon your orator complains and says as follows," the following words, to-wit: "That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars (\$2,000.00); indeed, vastly exceeds said sum or value."

On the second page thereof, at the end of the paragraph headed "Inducement," and after the words, "He succeeded in securing," the following words, to-wit: "The sum so expended being between three thousand five hundred dollars (\$3,500.00) and four thousand dollars (\$4,000.00).

And at the foot of the said bill, after the prayer for general relief and before the words, "And your orator, as in duty bound, will ever pray, &c., the following words, to-wit: "And also that a writ of subpoena issue out of and under the seal of this honorable court directed to the said defendants, the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee; A. B. Guigon, Edmund Pendleton and Louis Euker, commanding it and them, and each of them, upon a certain date therein named, to be and appear in this honorable court and there to answer all and singular the premises, and to abide by and perform such order and decree as may be entered by the court in the cause, but answer under oath from each and all of the said defendants is hereby waived."

NATHAN GOFF,
Circuit Judge.

(40) **DEMURRER TO BILL OF COMPLAINT.**

Filed October 31st, 1895.

IN THE UNITED STATES CIRCUIT COURT FOR THE EAST-
ERN DISTRICT OF VIRGINIA, IN THE FOURTH CIRCUIT.

L. H. Hyer, Plaintiff,	}	In Equity, No. 491.
<i>vs.</i>		
Richmond Traction Company		
and others, Defendants.		

Now come the the said defendants, by James Lyons,

their attorney, the said defendants not admitting or confessing anything in said bill contained, but protesting, &c., and saving and reserving the benefit of all just exceptions thereto, demur to the said bill, and say that the same is not sufficient in law, and that the said bill is without equity, and that the said plaintiff, L. H. Hyer, has a complete and adequate remedy at law, if he be entitled to any, upon the matters and things in said bill set forth.

Wherefore said defendants pray judgment of the Court, &c., and that they may be hence dismissed, &c.

RICHMOND TRACTION COMPANY AND OTHERS, by
JAMES LYONS, their Solicitor.

Oct. 31st, 1895.

Richmond, Va.

John L. Williams, one of the defendants aforesaid, personally appeared before me, M. F. Pleasants, Clerk of U. S. Circuit Court, East. Dist., Va., in my said office, at Richmond, this 31st day of October, 1895, and, being first (41) duly sworn, makes oath and says that the foregoing demarred is not interposed for delay.

JOHN L. WILLIAMS.

Subscribed and sworn to by John L. Williams before me this 31st day of October, 1895, in my office at Richmond.

M. F. PLEASANTS,
Clerk U. S. Circuit Court.

I, James Lyons, Counsel, practicing in U. S. Circuit Court, East. Dist. of Va., do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JAMES LYONS.

October 31st, 1895.

Richmond, Va.

(42) And at another day, to-wit: At a Circuit Court of the United States for the District aforesaid, held at Richmond, aforesaid, on the 1st day of February, 1896, the following order was entered, to-wit:

ORDER.

IN THE UNITED STATES CIRCUIT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA, IN THE FOURTH
JUDICIAL CIRCUIT.

L. H. Hyer, Plaintiff,

vs.

Richmond Traction Co. et als., D'f'ts.

} In Equity.

This day came the complainant, by Stiles & Holladay, his counsel, and came likewise the defendants, in both the original bill and amended and supplemental bill hereafter mentioned, by W. W. Henry and James Lyons, their counsel, and thereupon by leave of court and by consent of all parties by counsel, but without prejudice to the right of the defendants to make all proper defences, the complainant filed his amended and supplemental bill in this cause against the following persons and corporations, viz.: Richmond Traction Company, John W. Middendorf, Henry A. Parr, John L. Williams, John S. Williams, Ro. Lancaster Williams, the three last both individually and as partners doing business under the name and style of John L. Williams & Sons, Everett Waddey, R. Shirreffs, P. B. Sheild, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Louis Euker, E. B. Addison, Charles T. Child, Edmund Pendleton, William M. Habliston, and Maryland Trust Company; and thereupon the said defendants appeared in open court by W. W. Henry and James Lyons, their counsel, and waived process upon the said amended and supplemental bill; and then by leave of Court and consent of all parties, by counsel, the defendants in the respective bills filed their demurrers to the original bill in this cause, and to the said (43) amended and supplemental bill, but without waiver, on the part of the complainant of any ground of objection or exception, either in form or substance, to the said demurrers or to either of them; and then on motion of the complainant, by counsel, and by leave of Court and consent of all parties by their said counsel, the said demurrers are set down for argument before this Court at its court-room, in the City of Richmond, Virginia, during the present term.

NATHAN GOFF,
U. S. Circuit Judge.

Feb. 1st, 1896.

**AMENDED AND SUPPLEMENTAL BILL FILED IN ACCORD-
(44) ANCE W. TH FOREGOING ORDER.**

Filed February 4th, 1896, in pursuance of the order entered Feb'y 1st, 1896.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

	Hyer	}
(45)	v.	
Richmond Traction Company and others.		

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Virginia:

L. H. Hyer, a citizen of the State of Missouri, residing in Warrensburg, Johnson county, in the State of Missouri, brings this bill against the Richmond Traction Company, a corporation chartered under the laws of the State of Virginia, having its residence or chief place of business in the city of Richmond, Virginia, a citizen of the State of Virginia; John W. Middendorf and Henry A. Parr, residing (46) in the city of Baltimore, in the State of Maryland, citizens of the State of Maryland; John L. Williams, John S. Williams, Ro. Lancaster Williams, the three last named both individually and as partners doing business under the name and style of John L. Williams & Sons, Everett Waddey, R. Shereffs, P. B. Sheild, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Louis Euker and E. B. Addison, residing in the city of Richmond, in the State of Virginia, citizens of the State of Virginia; Charles T. Child, residing in the county of Hanover, in the State of Virginia, a citizen of the State of Virginia; Edmund Pendleton, residing in the county of Henrico, in the State of Virginia, a citizen of the State of Virginia; William M Habliston, residing in the city of Petersburg, in the State of Virginia, a citizen of the State of Virginia, and the Maryland Trust Company, a corporation chartered under the laws of the State of Maryland, a citizen of the State of Maryland, having its residence or chief place of business in the city of Baltimore, Maryland.

And thereupon your orator complains and says as follows:

MATTER IN DISPUTE.

That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars (\$2,000); indeed, vastly exceeds said sum or value.

ORIGINAL BILL AND PROCEEDINGS THEREON.

Your orator further sheweth unto your honors that on the 30th day of October, 1895, he filed his original bill in this cause against all the defendants herein above named, except Henry A. Parr, Ro. Lancaster Williams, E. B. Addison, William M. Habliston and the Maryland Trust Company, and that subpoenas were on the same day issued in the mode prescribed by law, returnable to December Rules, 1895, requiring all the defendants named in the bill to answer the allegations thereof, that, in pursuance of an order (47) made in this cause on the 14th day of November, 1895, by one of the judges of this Honorable Court, your orator immediately amended his said bill as authorized by said order, and that said original bill as amended, together with the exhibits filed therewith, is in the following words and figures, to-wit :

ORIGINAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
EASTERN DISTRICT OF VIRGINIA, IN THE
FOURTH JUDICIAL CIRCUIT.

L. H. Hyer, Plaintiff,

vs.

The Richmond Traction Company, a corporation chartered under the laws of the State of Virginia; John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Shield, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton, and Louis Euker, Defendants.

(This original bill is here omitted, because heretofore copied at length in this record. See page 1.)

(48) EXHIBIT "A" WITH BILL.

An Ordinance to Authorize the Construction and Operation of a Street Railway Within the Limits of the City of Richmond by the Richmond Traction Company.

(This paper is here omitted, because heretofore copied at length in this record. See page 17.)

No one of the defendants to the said original bill has filed or tendered his answer thereto, but said defendants,

by their solicitor, on the 31st day of October, 1895, placed among the papers of the cause, in the clerk's office of this court, their written demurrer to the said original bill.

NEW MATTER.

SUBSCRIPTION TO STOCK AND ORGANIZATION OF COMPANY.

And now, by way of amendment and supplement to the said original bill, your orator says that he has been informed, believes and therefore charges that no books for (49) subscription to the capital stock of the said Richmond Traction Company were opened, after proper legal notice and in the mode prescribed by law; that, without such notice and in violation of the laws of Virginia, the said John L. Williams, John Skelton Williams and Ro. Lancaster Williams, comprising a firm and partnership doing business under the name and style of John L. Williams & Sons, John W. Middendorf, Everett Waddey, R. Shereffs, P. B. Sheild, W. F. Jenkins and Charles T. Child, some time in September, 1895, met together, at the banking house of the said John L. Williams & Sons, in the city of Richmond, Virginia, and went through the form of signing their names to a paper purporting to be a subscription list agreeing to take \$300,000 of the capital stock of the said Richmond Traction Company, in the following proportions, viz.: John L. William & Sons, \$280,000; John W. Middendorf, \$5,000; Everett Waddey, \$3,000; R. Shereffs, \$3,000; Phil. B. Sheild, \$3,000; Charles T. Child, \$3,000, and W. F. Jenkins, \$3,000.

Your orator has been informed, and believes and therefore charges, that prior to and at the time of the said subscription, each, all and every of the said subscribers for the capital stock of the said company had been put upon inquiry as to the rights of your orator afterwards set out in his original bill, and inquiry by them, or by either of them, would have disclosed to them and to each of them, all the facts afterwards set out in said bill; that, indeed, each, all and every of the aforesaid subscribers had actual notice and knowledge of all your orator's said claims and rights, as afterwards set out in his said original bill, at the time of and prior to their said subscriptions.

Your orator has been further informed, believes and therefore charges, that no payment whatever was actually made at the time of subscribing or at any time subsequent thereto, by any or either of the said subscribers, for the capital stock of the said company; that any pretended payment in money or by checks or otherwise made at any time (50) or in any form by said subscribers or by any or either

of them, for the said capital stock or any part thereof, or any pretended passing of a consideration of any character to the said Richmond Traction Company, from the said subscribers, or any or either of them, in payment for the said stock or any part thereof, were fictitious and were wrongful and unlawful attempts to evade the laws of this Commonwealth; and your orator has been further informed, believes and therefore charges that since the time of their said subscriptions and without any lawful or valid payment from the said subscribers, or either of them, certificates, purporting to be for fully paid-up stock of the said company, have been wrongfully and illegally issued to the aforesaid subscribers for the amounts of their respective subscriptions.

Your orator is also further informed, believes and therefore charges, that the said so-called subscribers to the stock of the said Richmond Traction Company, on the very day of their said subscriptions, without having made or even pretended to make any payment of any character therefor, and without having complied with the laws of Virginia in respect to the formation and organization of joint stock companies, proceeded to go through the form of electing the following persons as a Board of Directors of the said company, viz.: John Skelton Williams, William M. Habliston, Philip B. Sheild, Everett Waddey, John W. Middendorf, Henry A. Parr and E. B. Addison, and of electing the said John Skelton Williams as president of the said company and William M. Habliston vice-president of the said company, and of authorizing the said pretended Board of Directors to appoint a secretary and treasurer for the said company.

Your orator further charges that all the aforesaid actings and doings of the aforesaid subscribers for the stock of the Richmond Traction Company and alleged stockholders thereof were done and performed with intent to hinder, delay and defraud your orator of and from what (51) he was and is lawfully entitled to, and were and are null and void under the laws of this Commonwealth. Your orator has been further informed, and believes and therefore charges, that each of the said directors, viz.: John Skelton Williams, William M. Habliston, Philip B. Sheild, Everett Waddey, John W. Middendorf, Henry A. Parr and E. B. Addison, at the time of their election, had been put upon inquiry as to all of the above recited facts and also as to the claims and rights of your orator, as set out in his said original bill, and inquiry by them or either of them would have disclosed to them and to each of them all the said facts and all the said rights and claims of your orator;

indeed, that each, all and every of said directors, except the said E. B. Addison, at the time of their said election, had actual notice and knowledge of said facts and of said rights and claims of your orator and of the above recited illegal and wrongful actings and doings of the said subscribers to stock or alleged stockholders, and participated also in their said intent to hinder, delay and defraud your orator in the premises.

Your orator charges that the said election of each, all and every of the said directors was null and void in law; and your orator avers and charges that the said directors, with the exception of the said E. B. Addison, with a full knowledge of all the above recited facts, proceeded, on the day of their own so-called election, to appoint Everett Waddey as secretary and Ro. Lancaster Williams as treasurer of the said corporation, which two said appointments your orator charges to have been illegal and utterly null and void.

AUTHORIZATION AND EXECUTION OF MORTGAGE.

Your orator further says that he has been informed, believes and therefore charges, that on the day following the filing of his said original bill in the clerk's office of this court (viz.: on the 31st day of October, 1895), each, (52) all and every of the defendants named therein, and the Maryland Trust Company, a corporation chartered under the laws of the State of Maryland, had actual notice and knowledge of the filing of the said bill, and of each, all and every allegation, statement and charge contained therein; and, in addition to this actual knowledge, that all the said defendants to the original bill, except John W. Middendorf, had constructive notice of the filing of the said bill, its contents and the rights of your orator by the service upon them and each of them by the United States Marshal for the Eastern District of Virginia, in the said district, on the 31st day of October, 1895, of the aforesaid subpoenas requiring them to answer the said bill; that on the day last named each, all and every of the said defendants (and the said Maryland Trust Company), the individuals acting in person or by their agents, solicitors, counsel or attorneys, and the said Richmond Traction Company and the said Maryland Trust Company, by those acting as their officers, directors, agents, servants, solicitors, counsel and attorneys, read or discussed the said bill and the rights of your orator as therein set out; that the said defendants to the said original bill, including the said John W. Middendorf, by their solicitors, counsel and attorneys, prepared and placed among the papers of this cause in the

clerk's office of this honorable court on the 31st day of October, 1895, their written demurrer to the said bill; that, for the purpose of wrongfully and unlawfully depriving your orator of his said rights, they determined to hold on the 1st day of November, 1895, a meeting of such persons claiming to be stockholders of the said Richmond Traction Company, or subscribers as aforesaid for the said capital stock, as could be assembled at the office of Messrs. John L. Williams & Sons, in the city of Richmond, Va., and to have resolutions adopted by such alleged stockholders or persons claiming to be such stockholders, directing the execution of a mortgage, from the said Richmond Traction (53) Company to the said Maryland Trust Company, as trustee, conveying the franchises and all property and assets of the said Richmond Traction Company to secure the payment of five hundred bonds of one thousand dollars each, to be issued by the said last-named company, negotiated and sold by the said Maryland Trust Company and the said John L. Williams & Sons, and the proceeds to be paid over to the said Richmond Traction Company, its so-called officers and directors, and disbursed by them in such manner as to wrongfully and illegally deprive your orator of his just and legal rights in the premises; that certain of the alleged stockholders or persons claiming to be stockholders of the said Richmond Traction Company met at time and place named, and went through the form of adopting resolutions authorizing the execution of the said trust deed or mortgage, and the issue and sale of bonds of the said Richmond Traction Company and a disposition of the proceeds of the sale thereof, a copy of which resolutions will be found written out upon the face of the trust deed or mortgage, hereinafter filed as an exhibit with this bill, and are prayed to be read and treated as if here inserted in full; but your orator has been informed, believes, and therefore charges, that no regular, proper or legal notice of the time and place of the said meeting was given; that certain subscribers for the capital stock of the said company, or persons claiming to be stockholders therein, standing upon the same footing with all other stockholders or alleged subscribers to the stock, had no notice or knowledge of the time and place for the said meeting; that the said stockholders' meeting, so pretended or attempted to be held on the 1st day of November, 1895 (as then constituted), had no power to authorize and direct the execution of a mortgage or trust deed upon the franchises and assets of the Richmond Traction Company, or to adopt the aforesaid resolutions; that no person who attended the said stockholders' meeting was in contemplation

(54) of law and the statutes of Virginia, an actual *bona fide* stockholder of the said company, clothed with power or authority to exercise any of the powers or functions of a stockholder in a joint-stock company under the laws of the State of Virginia; that no pretended stockholder who attended the said meeting had paid a dollar, in money, or otherwise, upon his subscription to the capital stock of the said company; that the said meeting was held, or attempted to be held, in violation of the laws of the State of Virginia; and that the said resolutions and all proceedings had, or attempted to be had, at said meeting were therefore null and void; that even if all persons who had subscribed for the capital stock had been present at, or had notice of the said stockholders' meeting, which is denied, no resolutions authorizing the execution of the said trust deed or mortgage could have been lawfully adopted by them, as they were not lawful stockholders, and had no lawful powers and no actual rights, and were all wrongdoers, attempting to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to, and for this reason, also, your orator charges that the said resolutions were and are null and void. Your orator has also been informed, believes and charges that the said stockholders, and each of them, who attended said meeting of November 1st, 1895, had before them at that time a copy of your orator's said bill, filed on the 30th day of October, 1895, or data and memoranda of its contents, or had previously read and discussed the said bill; that each, all and every of the said stockholders, prior to and at the time of the said meeting, had actual notice or knowledge of the several allegations, statements and charges contained in the said bill, and of the rights of your orator in the premises, and that said resolutions were adopted, or attempted to be adopted, with intent to hinder, delay and defraud your orator of and from what he is and was lawfully entitled to, and that the said resolutions and all proceedings (55) had thereunder are, for this reason also, wholly null and void.

In view of these facts your orator is advised and charges that each and every of the said stockholders who participated in said meeting, either in person or by proxy, made himself personally, jointly and severally liable to your orator for all loss and damage that may result to him from the adoption of the aforesaid resolutions and the proceedings had thereunder or connected therewith; and while your orator has not been able to ascertain fully who was present at the said alleged stockholders' meeting of November 1st, 1895, he has been informed, believes, and

therefore charges, that the following subscribers for the said stock were present, and participated in the said so-called stockholders' meeting, viz. : John W. Middendorf, John L. Williams & Sons, John L. Williams, John Skelton Williams, Ro. Lancaster Williams, Everett Waddey and P. B. Sheild.

Your orator further sheweth unto your honors that he has been informed, believes, and therefore charges, that immediately after the adoption of the aforesaid resolution, on the first day of November, 1895, by the so-called stockholders' meeting of the Richmond Traction Company the so-called directors of said company, on the same day and at the same place, attempted to hold a director's meeting; that said meeting was held in violation of the laws of the State of Virginia and in violation of the by-laws of said company; that, at the said meeting, the so-called directors in attendance went through the form of adopting resolutions authorizing and directing the execution of the aforesaid mortgage or trust deed, the negotiation and sale of the bonds secured thereby, and the disposition of the proceeds of the sale of said bonds; a copy of which resolutions will be found embodied in the trust deed or mortgage, hereinafter filed as an exhibit with this bill, and are now prayed to be read and treated as if here inserted in full; that said resolutions so adopted, or attempted to be (56) adopted, and all the proceedings of the said so-called directors' meeting of November 1st, 1895, were wholly illegal, null and void, and were had and adopted without lawful authority, by individuals having no power or authority to act as a board of directors for the said Richmond Traction Company, and that said resolutions were made and adopted with intent to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to, and are on this account also wholly illegal, null and void.

And, while your orator has been unable to ascertain whether all the aforesaid alleged directors of the said Richmond Traction Company attended said so-called meeting of said so-called board of directors of said company, held November 1st, 1895, your orator has been informed, believes, and charges that the said John W. Middendorf, John Skelton Williams and Wm. M. Habliston did attend said so-called meeting, and your orator is advised, and therefore charges, that said meeting was not a legal and valid meeting of the board of directors of the said company, and that the individuals who attended and took part in said meeting thereby made themselves personally, jointly and severally liable to your orator for all loss and

damage which have accrued or may hereafter accrue to to him from the action of the aforesaid meetings of November 1st, 1895.

Your orator is yet further advised, and charges that such of the so-called directors as absented themselves from said so-called meeting of the board of directors of the said company, held on the first day of November, 1895, with the exception of the said E. B. Addison, did so with full knowledge of your orator's rights in the premises, and of the intent and purpose of the said meeting to hinder, delay and defraud your orator of his said rights, and so absented themselves for the purpose of enabling those in attendance to adopt the aforesaid resolutions, which were adopted; and, therefore, your orator further charges that (57) the said so-called directors who so absented themselves from said meeting of November 1, 1895, also made themselves, personally, jointly and severally liable to your orator for all loss and damage which have accrued, or may hereafter accrue to him from the action of the so-called meeting.

Your orator is not informed that the said E. B. Addison took part in the said meeting and proceedings of the so-called Board of Directors of the Richmond Traction Company, of which he has been, and, as your orator believes, still is formally a member. Indeed, your orator's information leads him to believe that the said Addison did not take such part, and was not informed of the intent of the other directors, and did not attend or participate in said so-called directors' meeting of November 1st, 1895, and, as at present advised, your orator does not include, or intend to include, the said Addison in his aforesaid charges of wrongful and unlawful conduct on the part of the said directors of the said company; but, if hereafter advised or informed that the said Addison did attend and participate in the action of the said meeting of November 1st, 1895, or otherwise participate in the proceedings of the said so-called board of directors of said company, your orator will ask leave to amend his bill so as to pray for personal relief against said E. B. Addison also.

Your orator further sheweth that, following the adoption of the two aforesaid resolutions, the said Richmond Traction Company, acting by John Skelton Williams, as president, executed to the said Maryland Trust Company, as trustee, a trust deed or mortgage (being the mortgage authorized, contemplated and directed by the said resolutions) bearing date the 1st day of November, 1895, acknowledged by the said John Skelton Williams, as president, on the 4th day of November, 1895, signed also by the said Mary-

land Trust Company, and by it acknowledged on the said 4th day of November, 1895, and recorded on the last-named day in the Clerk's Office of the Chancery Court of (58) the city of Richmond, which said mortgage or deed of trust purports to be executed by authority of the aforesaid resolutions, which are copied at large upon the face thereof, and conveys the franchises of the said Richmond Traction Company, and all of its property and assets, to the said trustee, to secure the payment of the principal and interest of the said five hundred bonds of one thousand dollars each, particularly described in said trust deed or mortgage, a copy of which is herewith filed, marked "Exhibit B," and is prayed to be taken and read as a part of this amended and supplemental bill, as if here set out at full length.

Your orator has been informed, believes, and, therefore, charges, that said trust deed or mortgage was made and executed without lawful authority, and that the same should, therefore, be declared null and void by this honorable court; that the object and purpose of the said deed, of the sale of the bonds thereby secured, and of the disposition of the proceeds of sale thereunder directed, were to deprive your orator of his just and legal rights as set out in his original bill; that said trust deed or mortgage was made and executed with intent to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to receive; and that the said Maryland Trust Company had notice and knowledge of each, all and every of the facts hereinbefore set out, and especially of the fraudulent character of the said trust deed or mortgage, and of the aforesaid resolutions, and of the fraudulent intent with which each and every of them was adopted, made and executed, and that the said trust deed or mortgage should, for these reasons, also be declared null and void, and wholly annulled and set aside.

As bearing on the unlawful intent and character of the said deed, your orator now calls attention to the following marked features thereof, to-wit: that the aforesaid resolutions adopted by the so-called stockholders of the said Richmond Traction Company at their said meeting (59) held on the first day of November, 1895, purporting to authorize the execution of the said trust deed to the Maryland Trust Company (a copy of which resolutions may be found on the face of the said deed), required that each of the bonds secured thereby should contain a provision in the following words, viz:

"The holder of this bond agrees that no recourse shall be had for its payment to the individual responsibility of

any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred by or imposed on him by virtue of any law or statute which may now or hereafter be in force."

And, not content with the aforesaid attempted exemption from personal liability (by the resolutions of the said so-called stockholders and the clause required by them to be inserted in the said bonds), the said so-called board of directors, at their meeting held on the first day of November, 1895, in the resolution adopted by such of them as were present on that occasion purporting to authorize the execution of the said mortgage of trust deed to the said Maryland Trust Company, required the insertion therein of a provision in the following words, which may also be found on the face of said instrument, viz. :

ARTICLE XI.

"No holder of any of the bonds or coupons hereby secured shall have recourse for the payment thereof to the individual responsibility of any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred or imposed on him by virtue of any law or statute which may now or hereafter be in force."

But, while the aforesaid provisions contained in the said resolution and mortgage, attempting to exempt themselves from personal liability, serve to illustrate the intent (60) of the aforesaid so-called stockholders and directors in respect to their actings and doings in the premises, and their fear of personal responsibility therefor, yet your orator is advised and charges that these provisions are contrary to public policy, and for this reason, as well as for all other reasons hereinbefore recited, the said bonds and trust deed or mortgage are null and void in law. Let it be understood, however, that in making this charge, based upon the special features just mentioned, your orator does not intend in any way to yield his contention that the said trust deed or mortgage is fraudulent and void throughout. On the contrary, your orator again charges that the said trust deed or mortgage, in all of its parts and provisions, is fraudulent in law and in fact, and that the grantee in the said trust deed or mortgage had notice of the fraudulent intent of its immediate grantor, and that, therefore, the said trust deed or mortgage should be annulled and set aside.

Your orator is further advised and charges that whatever may be said by or in behalf of any of the defendants, except the said E. B. Addison, as to the absence of any

particular one or more of the said stockholders or directors of the said Richmond Traction Company from said meetings of November 1st, 1895, and whatever ingenious contention may be set up as to the consequent freedom from personal liability of any such absent stockholder or director for the action had and taken at said meetings or either of them, and especially for the resolutions above mentioned adopted at said meetings and the action taken pursuant thereto, there can be no doubt or question as to the liability in the premises of John W. Middendorf, John Skelton Williams, John L. Williams, Ro. Lancaster Williams, Everett Waddey, P. B. Sheild, John L. Williams & Sons and the Maryland Trust Company: not alone because said parties were present or represented at one or both of said meetings, but because they had otherwise the clearest and fullest notice of your orator's rights and claims in the premises; because some of them publicly denied, scouted, and ridiculed said rights and claims and (61) declared that they would pay no attention to the assertion of them, because all of them were specially active and influential in carrying out the scheme and plan by which your orator has been thus far cut off from any and all realization of his said rights; because the said John L. Williams & Sons and the Maryland Trust Company managed and engineered this entire scheme, and because the Maryland Trust Company, the trustee in said mortgage or deed of trust, was not only to the fullest extent informed as to the rights and claims of your orator in the premises; but, being so informed, thereafter advised, aided and abetted the determination and action of the said so-called stockholders' and directors' meetings and the adoption of each and all of the aforesaid resolutions, and sought and obtained the position and emoluments of trustee in the mortgage or trust deed of the Richmond Traction Company, prepared and executed pursuant to said resolutions. On these and other grounds your orator is advised and charges that all said last mentioned parties *i. e.*—all mentioned in this paragraph, except E. B. Addison and especially said Maryland Trust Company, should be held to the fullest extent liable to your orator for all loss and damage which have accrued and all that may hereafter accrue to him, from the action of said meetings of Nov. 1st, 1895, the adoption of said resolutions at said meetings, the execution of said mortgage or trust deed, the negotiation of the bonds secured thereby and the disposition of the proceeds of the sale of said bonds.

Your orator is further and finally advised, and therefore charges, that all the so-called stockholders and direc-

rectors of the Richmond Traction Company who are made defendants to this bill, except the said E. B. Addison, were wrongdoers conspiring together with intent to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to receive, and are therefore, and for the reasons hereinbefore mentioned, personally, jointly and (62) severally liable to your orator as in the paragraph last above set out, and for all loss and damage which has accrued or may hereafter accrue to your orator from the organization of the Richmond Traction Company, the making of contracts in its name and from its debts or liabilities, if any such there be.

Yet, notwithstanding the personal liability of the said parties to him, your orator is advised and charges that he will be exposed to irreparable injury, unless the court interfere by injunction to prevent the further negotiation and sale of the bonds issued by the Richmond Traction Company and the further expenditure of the money received for such sale, and the making and execution of contracts in its name and appoint a receiver to take charge of all property and assets of the said company.

For as much, therefore, as your orator is remediless, save in a Court of Equity where such wrongs are properly cognizable and relievable, he prays that the Richmond Traction Company, John W. Middendorf, Henry A. Parr, John L. Williams, John S. Williams, Ro. Lancaster Williams, the three last named both individually and as partners doing business under the name and style of John L. Williams & Sons, Everett Waddey, R. Shereffs, P. B. Sheild, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guignon, Louis Euker, E. B. Addison, Charles T. Child, Edmund Pendleton, William M. Habliston and the Maryland Trust Company, be made parties defendant to this bill and required to answer the same, but answer under oath from each, all and every of the said defendants is hereby waived; that the relief sought and prayed for in his original bill heretofore filed in this cause may be granted to your orator, and, to that end, he here again presents and respectfully presses upon the attention and grace of the court the several prayers of his said original bill, and prays that they may be read, treated and granted as if here again fully repeated and written out; that the so-called subscription to the capital stock of the said Richmond Traction Company made as hereinabove set out, may be declared and decreed to be illegal, null and void; that the script or stock certificates issued to the several so-called subscribers to the capital stock of the said company, upon and by virtue of their so-called subscriptions, may be ordered to be delivered up,

declared null and void and cancelled; that the organization of the said Richmond Traction Company and the election of its so-called officers and board of directors, (63) upon the basis of the so-called subscriptions and stock, may be declared and decreed to be illegal and null and void, and that the same may be vacated by the decree of this Court; that the so-called stockholders' and directors' meetings of the said company, held as above set out on the 1st day of November, 1895, and all the proceedings of the said meetings may be declared to be illegal and invalid, and particularly that the resolutions adopted at the said meetings authorizing and directing the execution of the mortgage or trust deed from the said Richmond Traction Company to the said Maryland Trust Company, as trustee, conveying the franchises, property and assets of said company to secure the bonds to be issued by it, and directing the negotiation and sale of said bonds and disposition of the proceeds of such sale, which resolutions are written out upon the face of said mortgage or deed of trust, may be declared to be illegal, invalid, null and void, that for all the reasons recited in this bill, the said mortgage or trust deed may be declared to be illegal, null and void and be set aside by decree of this court; that all the bonds so secured by said mortgage or trust deed which have been negotiated and sold may be called in, and that these and all other bonds executed or issued pursuant to the resolutions aforesaid may be decreed to be delivered up and cancelled; that all the so-called stockholders and directors of the said Richmond Traction Company, except the said E. B. Addison, and particularly such of them as attended the said stockholders' and directors' meetings of November 1, 1895, which passed and adopted the resolutions aforesaid, may be declared and decreed to be wrong-doers conspiring together with intent to hinder, delay and defraud your orator of his just rights in the premises, and may be held and decreed to be personally, jointly and severally liable to your orator for all loss and damage which have accrued, or may hereafter accrue to him in consequence of the action of the said meetings of November 1st, 1895, the adoption of said resolutions at said meetings, the execution of said mortgage or trust deed, the negotiation of the funds secured thereby and the disposition of the proceeds of the sale of said bonds; that all the defendants may be required and decreed to do, perform and pay whatever may be necessary, to discharge the said Richmond Traction Company and franchise from the consequences of the organization of the said company, and from all contracts, debts and

liabilities contracted in the name of the said company, and in all respects to discharge and exonerate the said company and franchise from the payment of all of its debts, liabilities and contracts of every character whatsoever, so far as the same may be prejudicial to the rights of your orator. That the said Maryland Trust Company may be enjoined and restrained from discharging any, all and every of the acts or duties of trustee imposed upon or assumed by it under the said trust deed or mortgage, and especially from authenticating any of the said bonds intended to be secured by the said trust deed or mortgage by the signature of its president to the certificate endorsed on the said bonds, and from delivering the said bonds, or any or either of them, to the said Richmond Traction Company, its president, vice-president, officers or agents, or to any other persons acting for it or in its name, and from selling or otherwise disposing of the said bonds, or either of them, and from paying over any funds in its hands from the sale or other disposition of the said bonds, or any or either of them, to the said Richmond Traction Company, its officers, directors, agents or others, acting for it or in its name; that the said Richmond Traction Company, its officers, directors, agents, and others acting by or under its authority may be enjoined and restrained from selling or otherwise disposing of the said bonds, or any or either of them, and from paying out or otherwise disposing of the proceeds derived from the sale or other disposition of the said bonds, or any or either of them; that the said Richmond Traction Company, its officers, directors and all others acting or pur-(65) porting to act in its name may be enjoined and restrained from entering into any contract or incurring any debt or liability in the name of the said Richmond Traction Company, or exercising any of the rights, powers, functions or privileges of the Richmond Traction Company; that a receiver may be appointed pending the determination of this cause to take charge of all of the aforesaid bonds, of all the proceeds from the sale of such of them as may have been sold or otherwise disposed of, and of all the property and assets of the said Richmond Traction Company of every character and wherever situated; and that all proper inquiries may be made, accounts taken and decrees entered; and your orator further prays that he may have and be granted such other, further, general and complete relief as may be agreeable to equity and the nature of his case.

Your orator also prays that a writ of subpoena may issue out of and under the seal of this honorable court di-

rected to each, all and every of the persons and corporators hereinbefore prayed to be made parties defendant to this amended and supplemental bill, commanding them and each of them, upon a certain date named therein, to be and appear in this honorable court, and there to answer all and singular the premises and to abide by and perform such order and decree as may be entered by the court in this cause; but answer under oath from each and all of the said defendants is hereby waived.

And your orator, as in duty bound, will ever pray &c.

L. H. HYER.

STILES & HOLLADAY,
Solicitors for Complainant.

"EXHIBIT B."

"Exhibit B," with amended and supplemental bill, being a copy of the trust deed or mortgage of November 1, 1895.

(Copy.)

(66) This indenture, made this first day of November, in the year eighteen hundred and ninety-five, between the Richmond Traction Company, a corporation created by and existing under the laws of the State of Virginia, party of the first part, hereinafter called the "Mortgagor," and the Maryland Trust Company, as trustee, a corporation created by and existing under the laws of the State of Maryland, party of the second part, hereinafter called the "Trustee."

Whereas, by an Act of General Assembly of the State of Virginia, entitled "An act to authorize the Common Council of Richmond to authorize persons to construct railroads in the streets of said city," passed March 20th, 1860, and known as Chapter 214 of the Acts of Assembly of 1859-60, it is provided that the Common Council of the city of Richmond shall have the power to authorize any persons or companies to construct railroads in the streets of the city of Richmond, under such provisions, restrictions and limitations as the Council may prescribe; and that when such persons or companies are so authorized to construct such railroads the said persons or companies, with such persons as may unite with them, shall be a corporation with the powers and duties and for the time prescribed and authorized by their agreement with the said Council, subject to the general laws of the State of Virginia relating to corporations and chartered companies applicable to such

corporations and not inconsistent with said act of March 20th, 1860.

And whereas, by the said act it is further provided that any persons or companies authorized by the Council to construct such railroads may, with the consent of the County Court of Henrico County, extend their road or roads into the county of Henrico any distance not exceeding ten miles, and that they may at any time borrow money for the purpose of building, equipping or extending their roads, and may issue bonds therefor bearing interest not exceeding eight per centum per annum, and may secure (67) the same by a deed of trust or mortgage upon the whole or any portion of their property.

And whereas, by an ordinance of the Council of the city of Richmond, entitled "An ordinance to authorize the construction and operation of a street railway within the limits of the city of Richmond by the Richmond Traction Company," approved August 28th, 1895, the mortgagor was, in virtue of the authority vested in the Common Council of the city of Richmond by the act of March 20th, 1860, duly created a corporation under the name of the "Richmond Traction Company," for the purpose of constructing, equipping, maintaining and operating a line or lines of street railway in the city of Richmond and in the county of Henrico, in the State of Virginia.

And whereas, by a contract between the County Court of Henrico county and the mortgagor, dated the twenty-eighth day of October, 1895, the mortgagor was empowered to extend its road along certain streets and avenues in the county of Henrico.

And whereas, at a general meeting of the stockholders of the mortgagor, duly called and held in the city of Richmond, in the State of Virginia, on the first day of November, 1895, the following resolution was unanimously adopted, viz.:

"Whereas, in order to build, equip and extend its line or lines of street railways in the city of Richmond and county of Henrico, it is necessary for this company to borrow a sum or sums of money not exceeding five hundred thousand dollars.

"Now, therefore, be it resolved that this company do make and issue its first mortgage coupon bonds, bearing date November 1st, 1895, and payable to bearer, for the aggregate amount of five hundred thousand dollars, the same to be of the denomination of one thousand dollars each, and to be payable both as to principal and interest in gold coin of the United States of America not inferior to the present standard of weight and fineness, the princi-

(68) pal to be payable on the 1st day of November, 1925, and the interest to be payable at the rate of five per cent. per annum, semi-annually, on the first days of January and July in each year, according to the coupons to be thereto attached, and to account from November 1st, 1895, and the said bonds shall be numbered from one to five hundred, both inclusive, and shall be disposed of from time to time as the board of directors of this company shall direct, and the proceeds of sale of the same shall be applied by the board of directors to the building, equipping and extending of the lines of railway of this company now owned or hereafter to be acquired by it, but no proceeds of any of the bonds so to be issued shall be applied toward the construction, equipment or extension of any lines of railway unless the same shall be free from all encumbrances other than the lien of the mortgage securing the bonds to be issued under this resolution.

“ And be it further resolved that to secure the payment of said bonds, with the interest to accrue thereon, this company do make, execute and deliver unto the Maryland Trust Company, a corporation incorporated under the laws of the State of Maryland, having its principal office in the city of Baltimore, a mortgage, in such form and containing such provisions as may be hereafter approved by the board of directors of this company, conveying and creating a first lien on all the property, real and personal, of this company, now owned or hereafter to be acquired by it, and the income thereof, and on all the corporate rights and franchises of the company, in trust for the equal benefit and security of the holders of said bonds, without preference, priority or distinction between them as to lien or otherwise, but with the proviso that the lien of the mortgage on any line of railway hereafter to be acquired by this company, and the income therefrom shall be subsequent and postponed to the lien of any mortgage that may be hereafter executed by this company on such after acquired railway to secure bonds of this company, the proceeds of which are to be applied to the payment for such railway to be hereafter acquired.

“ And be it further resolved, that the president and secretary of the company be and they are hereby authorized and empowered for and on behalf of this company to affix its corporate seal to each of said bonds, and to sign the same as such president and secretary, and, when so executed, to deliver the same to the trustee, with the interest coupons thereto attached, and the coupons shall be authenticated by the signature of the treasurer of this company engraved thereon, and his engraved signature

thereto shall be regarded and treated in all respects as equivalent to his manual signing of the same, and the bonds so to be issued and the coupons to be thereto attached shall be substantially in the forms following, and shall, after certification by the trustee, be from time to time delivered by the trustee to the president or vice-president of this company upon his written receipt therefor, accompanied by a copy of a resolution of the Board of Directors of this company authorizing him to receive from and receipt to the trustee for the same, to-wit:

FORM OF BOND.

No. —

\$1,000

United States of America,

State of Virginia.

Richmond Traction Company.

First Mortgage Five Per Cent. Gold Bond.

The Richmond Traction Company, a corporation created by the laws of the State of Virginia, for value received, promises to pay to bearer, if not registered, or to registered owner hereof, if registered, one thousand dollars in lawful gold coin of the United States of America, not inferior to the present standard of weight and fineness, at the office of the Maryland Trust Company, in the city of Baltimore, Maryland, or at the banking house of John L. Williams & Sons, in the city of Richmond, as the holder hereof may elect, on the 1st day of November, 1925, on the surrender of this bond, with interest thereon, in the meantime, at the rate of five (5) per centum per annum, payable semi-annually, in like gold coin, at said office, or at said banking house, on the first days of January and July in each year, on presentation and surrender of the interest coupons hereto attached, when respectively due, without any deduction for any national, State or municipal taxes which the Richmond Traction Company may be by law required to pay.

This bond is one of a series of first mortgage bonds, each of like tenor, date and amount, numbered from one to five hundred, both inclusive, for the aggregate sum of five hundred thousand dollars, issued by the authority of the stockholders of the Richmond Traction Company, and secured by a first mortgage dated November 1st, 1895, executed by the company under such authority, and by it delivered to the Maryland Trust Company as trustee for the holders of said bonds, and conveying all the property,

railways, rights and franchises of this company, and the income to be derived therefrom, as fully set forth in said mortgage.

If default shall be made in the payment of any instalment of interest on any of said bonds, the principal hereof may be made due and payable in the manner provided in said mortgage, and this bond is subject to purchase by the trustee for the sinking fund at the maturity of any interest coupon after July 1st, 1900, on the payment to the holder of a sum equal to the principal and accrued interest, and a premium of five per cent. on the principal sum of the bond as provided in the mortgage.

The holder of this bond agrees that no recourse shall be had for its payment to the individual responsibility of any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred by or imposed (71) on him by virtue of any law or statute which may now or hereafter be in force.

This bond may, at the option of the holder hereof, be registered at the office of the trustee in the city of Baltimore, and such registration shall be endorsed on the back hereof, and thereafter, unless at any time registered as payable to bearer, the principal of this bond will be payable only to the last registered holder or transferee thereof, but such registration shall not affect the negotiability of the coupons by delivery merely.

This bond shall not become valid or obligatory until authenticated by the signature of the president of the trustee to the certificate indorsed thereon.

In witness whereof, the Richmond Traction Company has caused these presents to be sealed with its corporate seal, authenticated by the signature of the president, and attested by its secretary this 1st day of November, 1895.

RICHMOND TRACTION COMPANY.

By _____,
President.

Attest :

_____,
Secretary.

(FORM OF COUPON.)

No. _____

\$25.

The Richmond Traction Company will pay to bearer on the first day of _____, twenty-five dollars in gold coin of the United States of America, at the office of

the Maryland Trust Company, in Baltimore, Maryland, or at the banking house of John L. Williams & Sons, in Richmond, Virginia, as the holder hereof may elect, being six months' interest on its first mortgage thirty years gold bond, No. ———, for one thousand dollars.

_____,
Treasurer.

(72) (FORM OF TRUSTEE'S CERTIFICATE.)

The Maryland Trust Company hereby certifies that this bond is one of the series of bonds mentioned in the within mortgage.

MARYLAND TRUST COMPANY,

Trustee.

By _____,

President.

And, whereas, at a meeting of the board of directors of the mortgagor, held after due notice in the city of Richmond, on the 1st day of November, 1895, the form of this mortgage having been then and there submitted by the president to the meeting and entered upon the minutes of the board, it was

“Resolved, That the form of mortgage from this company to the Maryland Trust Company as trustee, submitted by the president, is hereby approved, and that said mortgage be made and executed by the officers of this company on its behalf, and with its corporate seal thereto affixed, and be duly acknowledged and delivered to the trustee and recorded according to law, and that the officers of this company do and cause to be done all acts necessary, proper or expedient to carry into effect the objects and purposes expressed in this resolution and in the resolution of the stockholders of this company relating to said mortgage, and the bonds to be thereby secured, to perfect the issue of the bonds and the mortgage to secure the same.”

Now this indenture witnesseth that the mortgagor, for the purpose of securing the payment of the principal and interest of the said bonds when and as the same shall become due and payable, according to the tenor and effect thereof, and in consideration of the premises and the sum of one dollar to it paid by the trustee at the time of the execution and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned,

(73) transferred and conveyed, and does hereby grant, bargain and sell, assign, transfer and convey unto the trustee and its successor or successors in the trust hereby created, and its or their assigns forever, all of the property, rights and franchises now owned, or that may be during the existence of this mortgage acquired by the mortgagor of every kind, nature or description, and all of the tolls, fares and revenues that may be derived therefrom, and including all of its real and personal property, with the improvements and appurtenances, and all of its rights of way and lines of railway and tracks now or to be hereafter laid down, constructed, used or operated by it, with the branches and extensions thereof, and the switches and turnouts, lying and being in the city of Richmond and county of Henrico, in the State of Virginia, and all of its equipments, rolling-stock, poles, wires, dynamos, motors, engines, plant and machinery, whether electric or otherwise, and the tolls, fares and revenues to be derived from any of said properties, and all of the privileges and franchises of the mortgagor, but the lien of this mortgage on any line of railways hereafter to be acquired by this company and the income therefrom shall be subsequent and postponed to the lien of any mortgage that may be hereafter executed by this company on such after-acquired railway, to secure bonds of this company, the proceeds of which are to be applied to the payment for such railway to be hereafter acquired.

To have and to hold all of the real and personal property and revenues, and the rights, privileges and franchises hereby conveyed to the trustee, its successor or successors in the trust hereby created, and its and their assigns, forever, to their sole use and benefit, but in trust, nevertheless, for the equal *pro-rata* benefit and security of all parties who may be or become holders of any of the bonds or coupons so issued, or to be issued, without any preference, priority or distinction between them as to the lien of any (74) of said bonds over others by reason of priority in time of issue or negotiation, or otherwise, and so that each and all of the said bonds shall be equally secured hereby, but subject to the terms and conditions following; that is to say:

ARTICLE I.

Provided, that if the mortgagor shall pay the principal of all of the said bonds and the interest thereon according to the tenor of said bonds and the coupons thereto attached, without deduction for national, state or municipal taxes or assessments, and shall perform all of the stipu-

lations of this mortgage, then these presents shall be void, and the rights, estates and interests hereby granted shall cease and determine. And, until default shall be made by the mortgagor in any of the premises, it shall be entitled to remain in possession and enjoyment of all of the property hereby granted in trust and take the income thereof and exercise all of its franchises as if this mortgage had not been made.

ARTICLE II.

The principal and interest of said bonds are payable without deduction for any tax now or hereafter imposed thereon, which the mortgagor is or may be required to retain therefrom, and the mortgagor hereby covenants that it will pay and discharge at their maturity the principal and interest of said bonds, and that it will pay and discharge when and as the same shall become due all taxes and other charges of every kind which may be payable, or become a lien upon any of the property, income or franchises hereby conveyed, or intended to be covered by the lien of these presents, and the said mortgagor does also covenant that it has done no act to encumber any of the property or franchises hereby conveyed, and that it will not suffer or permit any lien to be acquired thereon superior to the lien hereby created. In case the mortgagor (75) fails to pay such taxes the trustee may, in its discretion, pay the same, and the amount paid therefor shall be a lien on the mortgaged property prior to that of said bonds and coupons, and shall be payable on demand to the trustee, with lawful interest, but shall not be a charge against the bonds or bondholders personally.

ARTICLE III.

The mortgagor hereby covenants to do everything necessary to maintain the mortgaged property in good condition and to permit no waste thereof and to keep all of the mortgaged property and chattels, which may be insurable, fully insured against loss or damage by fire for the benefit of the holders of said bonds, and to deliver the policies to the trustee to whom the insurance shall be made payable, any avails of insurance to be paid to the trustee and to become subject to the lien of this mortgage, as fully as if now owned by the mortgagor and expressly described herein, and to be applied to the restoration of the property damaged or destroyed, which shall also be subject to the lien hereof.

In case the mortgagor fails to effect or renew the insurance, the trustee may, in its discretion, effect the same,

and the premiums paid therefor shall be a lien on the mortgaged property prior to that of said bonds and coupons and shall be payable on demand to the trustee, with lawful interest, but shall not be a charge against the bonds or bondholders personally.

ARTICLE IV.

None of the said bonds shall be valid obligations of the mortgagor without the certificate thereon of the trustee, authenticating the same, nor shall any coupon be valid unless the bond to which the same may belong shall be so certified, and in the execution of the coupons annexed to (76) the bonds secured by this mortgage, the signature of the treasurer of the mortgagor engraved thereon shall be regarded and treated as in all respects equivalent to the manual signing of the coupons by him.

ARTICLE V.

And the mortgagor hereby covenants with the trustee for and on behalf of the bondholders entitled to the benefit of the security hereby provided that the mortgagor will at any and all times hereafter, on demand, make, do and execute all such other and reasonable assurances, acts, deeds and things as in the opinion of competent counsel may be necessary or proper to effectuate the lien and security hereby intended to be created for the benefit of the holders of the bonds hereby secured, and especially to render subject to the lien of this mortgage, any and all property hereafter acquired by the mortgagor during the existence of this mortgage, but with the proviso relative to after-acquired railways and the income thereof hereinbefore mentioned, relating to mortgages to be given thereon.

ARTICLE VI.

The mortgagor covenants that at least once in each year, and whenever else requested to do so, it will render to the trustee a full and true statement of its financial condition, verified by the oaths of its president and treasurer or secretary, and that at any time during the existence of this mortgage its property, books and accounts may be examined by any person or persons designated by the trustee for that purpose.

ARTICLE VII.

In case of any default for ninety days in the payment of the interest on any of the said bonds or in the payment of any taxes or charges on the mortgaged property or in

(77) any stipulation of this mortgage or in the said bonds on the part of the mortgagor to be performed, then the holders of one-fourth in amount of said bonds then outstanding may elect to declare the whole principal sum of the bonds to be due and payable, and may, by an instrument in writing, under their hands, instruct the trustee to so declare said principal; whereupon the whole principal sum of each and all of said bonds then outstanding shall forthwith be due and payable, notwithstanding that the time limited therein for the payment thereof may not then have elapsed; and in the event of any sale by the trustee under the powers conferred by this mortgage of any of the property, rights and franchises hereby mortgaged, the whole principal sum of each and all of the bonds secured hereby shall forthwith be due and payable, notwithstanding that the time limited therein for their payment may not then have expired.

ARTICLE VIII.

If the mortgagor shall at any time hereafter, after demand made, make default for ninety days to pay the interest on any of the bonds hereby secured as the same shall become due and payable, or shall make default for any period after the maturity of said bonds to pay the principal sum of any of them, or shall make default for ninety days in the payment of any taxes or charges on the mortgaged property, or in any stipulation of this mortgage or in said bonds, on the part of the mortgagor to be performed, then in any of said cases it shall be the duty of the trustee upon the written request of the holders of one-fourth in amount of the bonds hereby secured and then outstanding to enter upon and take possession, with such force as may be necessary, of all and singular the above granted property, rights, and franchises, and to direct, operate and manage the same, and from time to time to make thereto all needful repairs (78) and replacements, and such alterations and improvements as may be deemed judicious, and to receive the passenger fares, revenues and income thereof and appropriate the net income and proceeds derived therefrom, after deducting the expenses of this trust in full, including reasonable attorney's and counsel fees, to the payment in full, without giving preference, priority or distinction of one bond over another—first, of the interest due on said bonds, and secondly, of the principal of all the said bonds issued upon the security of these presents and then outstanding, in full, if the said income and proceeds shall be sufficient, but if not, then *pro rata*; and the trustee in any of said cases, if so required in writing by the holders of one-fourth

in amount of the bonds issued upon the security of these presents then outstanding, shall, after or without entering upon or taking such possession of said property and premises, set all and singular the mortgaged estate and property, real and personal, and the rights, franchises and premises hereby mortgaged to the highest bidder at public sale in the city of Richmond, having first given notice of the time, place and terms of such intended sale by publication to be made twice in each week in one daily newspaper published in the city of Baltimore, in one daily newspaper published in the city of New York, and in two daily newspapers published in the city of Richmond, for a period of not less than four weeks preceding the sale, and thereupon, upon payment of the whole purchase money by the purchaser or purchasers to the trustee, the trustee shall grant and convey all said property, franchises and premises, with the appurtenances, unto such purchaser or purchasers, freed from all and every the trusts hereby created, and shall appropriate the purchase money, after deducting the expenses of such sale, including reasonable attorney's and counsel fees, to the payment without preference, priority or distinction of one bond over another, first of the interest due on the said bonds, and secondly, (79) of the principal of all the said bonds issued upon the security of these presents and then outstanding, in full, if the said purchase money shall be sufficient, but if not, then *pro rata*, and the surplus, if any, remaining in the hands of the trustee, after the payment of all said costs, charges and expenses and after the payment in full of all the interest and principal of all the said bonds, as aforesaid, shall be paid by the trustee to the mortgagor or those lawfully claiming under it. It is further understood and agreed that the trustee may, in its discretion, adjourn any sale from time to time by giving at the time of making such adjournment reasonable notice of the time to which the same is adjourned, and, if so adjourning, may make sale without further notice at the time to which the sale may be so adjourned, and at the place mentioned in the advertisement of the sale as originally published, but the provisions contained in this article and the rights reserved to the trustee hereunder are cumulative and additional to all other remedies allowed by law for the foreclosure of mortgages, and the trustee shall, upon the written request of the holders of one-fourth in amount of all outstanding and unpaid bonds secured hereby, and upon being properly indemnified, and whenever entitled so to do by the terms of this mortgage, institute proceedings, in law or in equity, to foreclose the same.

ARTICLE IX.

It is further agreed that at the sale, if any such there should be, of the property, rights and franchises, or any part thereof, hereby conveyed, to be made by virtue of the foregoing power of sale, or by judicial authority, for the purpose of enforcing the lien of these presents, the trustee may, with the assent in writing of the holders of at least one-half of the bonds hereby secured and then outstanding, personally or by agent or attorney, bid for, and if the same be attainable at the price hereinafter mentioned, (80) purchase the property so offered for sale, on behalf of all holders of the bonds secured by this instrument then outstanding, in proportion to the respective interests of such holders in the said bonds and the coupons thereto belonging, provided, however, that nothing herein contained shall authorize the trustee to bid on behalf of the holders of said bonds a sum exceeding the whole amount of the bonds then outstanding, with the interest accrued thereon, and the expenses of such sale for the entire property then held upon the trusts of this mortgage, or to bid a sum reasonably proportionate thereto for any part of the said property. And it is hereby further agreed that the bonds and overdue coupons aforesaid shall be received in payment of so much of the purchase money of any property sold at such sale as may be awarded on the bonds and coupons so to be received to the holders thereof in the distribution of the sale fund.

ARTICLE X.

The mortgagor hereby irrevocably waives the benefit and advantages of all stay, exemption, extension, valuation and appraisement laws now existing, or hereafter to be passed by the United States or the State of Virginia, which may or might prevent, postpone, hinder or delay the exercise the right of the trustee to enter upon, operate or sell the mortgaged premises or any part thereof, or to commence or continue any action or proceeding in regard thereto, or to the exercise of any powers, rights, privileges and remedies of the trustee, or of any of the bondholders under the provisions hereof, and the mortgagor hereby expressly covenants and agrees not to claim, set up or take the benefit or advantage of any such laws.

(81)

ARTICLE XI.

No holder of any of the bonds or coupons hereby secured shall have recourse for the payment thereof to the

individual responsibility of any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred or imposed on him by virtue of any law or statute which may now or hereafter be in force.

ARTICLE XII.

It shall be lawful for the mortgagor by and with the consent in writing of the trustee, at any time or times hereafter to exchange for other property, or to sell, lease or otherwise dispose of any part of the mortgaged property and premises, free and clear from the lien or encumbrance hereof, and to convey the same without liability on the part of the purchaser to see to the application of the purchase money, and the proceeds of such sales or dispositions shall be paid to the trustee, and shall, under its direction and with its approval, be reinvested by the mortgagor, and the property in which the same shall be reinvested, as well as any property that may be acquired in exchange as aforesaid, by the mortgagor, shall be subject to all the trusts hereby declared, including the power to sell, lease or exchange or otherwise dispose of herein reserved in regard to the property in this indenture described, and, if it shall be so required, the same shall be conveyed in mortgage by the mortgagor to the trustee, to be so held.

And the mortgagor shall also be entitled, with the consent in writing of the trustee, to make such alterations in the routes of any part of its lines of railway as will promote its interest and any routes substituted or constructed in the lieu of a route abandoned, shall become and be subject to the lien and all the trusts and provisions of this mortgage, as fully as though the same were herein specifically conveyed and the route so abandoned shall be released by the trustee from the lien of these presents.

ARTICLE XIII.

The trustee may be removed by written instrument, to be executed in duplicate under the hands of the majority in amount of the holders of all the bonds then outstanding, one of the duplicates to be delivered to the mortgagor and the other thereof to the trustee, and the removal of the trustee shall take effect upon the appointment and acceptance of its successor. In case of a vacancy in the office of trustee hereunder from any cause whatsoever, the board of directors of the mortgagor shall have power to fill the vacancy by the appointment of a solvent trust company, doing business in the city of Baltimore, to act as

and be trustee hereunder, and, in case said board of directors do not make the said appointment within thirty days after the delivery of said duplicates as aforesaid, or the occurrence of any vacancy, the holders of a majority in amount of all the bonds at such time outstanding may, in writing, designate a solvent trust company, doing business as aforesaid, to act as and be trustee hereunder, and thereupon and in either case such new trustee shall, when appointed as aforesaid, be vested with all of the estate, right, title, interest, powers and duties hereby conferred on and vested in the trustee hereby appointed, without any conveyance of the same, as fully to all intents and purposes as if the new trustee had been hereby appointed and constituted, and thereupon it shall be the duty of the mortgagor to execute under its corporate seal a certificate, or other proper instrument, and to acknowledge and deliver the same, to be recorded in the proper records in the State of Virginia, showing the appointment of the new trustee, however it may be selected, and the mortgagor hereby covenants with the holders of said bonds that it will execute, acknowledge and deliver said (83) certificate or other proper instrument. And it shall also be the duty of the trustee to assign, transfer and deliver up to the new trustee all of the trust property in its hands, which it hereby covenants to do.

ARTICLE XIV.

The mortgagor agrees to keep at the office of the trustee proper books for the purpose of registration and transfer of the bonds hereby secured, and any bond may, at the option of the holder thereof, be registered at the office of the trustee, in the city of Baltimore, and such registration shall be indorsed thereon, and thereafter, unless registered as payable to bearer, the principal of the bond will be payable only to the last registered holder or transferee thereof, but such registration shall not affect the negotiability of the coupons by delivery merely. The reasonable charges of the trustee for registration of the bonds shall be borne by the mortgagor.

ARTICLE XV.

It is expressly agreed that the trusts created by this instrument are accepted upon the express condition that the trustee shall not incur any liability or responsibility whatever otherwise than for its own wilful default or misconduct; nor shall the trustee become responsible or liable for any destruction, deterioration, loss, injury or damage which may be done or accrue to the property and premises

hereby conveyed, or which shall be held by the trustee under the provisions of this mortgage at any time; nor shall the trustee be in any way responsible for the consequences of any breach on the part of the mortgagor of the covenants herein contained, nor of any act of the mortgagor; nor shall the trustee be held liable for any act, default or misconduct of any agent or persons employed by it, unless chargeable with gross negligence in the selection or continuance of their employment; nor shall the trustee be considered as required to take any action hereunder unless and until requested so to do by the persons having the right to invoke its action by the terms of this mortgage, accompanied by a deposit with the trustee of the bonds held by such persons, and by proper indemnity to the trustee for any liability, expense or outlay to be incurred by it.

And it is also understood that the trustee shall be entitled to be reimbursed all proper outlays of charges or expenses by it incurred in the discharge of the trust hereby created, and to receive a reasonable compensation for any duties rendered or performed in the discharge of the same, which compensation and disbursements shall constitute a lien on the hereby mortgaged property prior to that of the bonds secured by these presents, but shall be no charge against the bonds or bondholders personally.

ARTICLE XVI.

The word "Mortgagor," whenever used in this instrument, shall be construed to mean the party of the first part, its successors or assigns, unless such meaning would be unreasonable, and, in like manner, the word "Trustee," wherever used in this instrument, shall be construed to mean the trustee, its successor, or successors, in the trust, unless such meaning would be unreasonable.

ARTICLE XVII.

To provide a sinking fund for the redemption of said bonds, the mortgagor shall annually, accounting from January 1st, 1900, set aside from its income and earnings not less than one and one-quarter per cent. of the aggregate principal of all of the bonds theretofore issued by the mortgagor, secured by this mortgage, and shall pay over the same to the trustee in equal semi-annual instalments on the first days of January and July, the first payment to be made July 1st, 1900. The sums so to be paid to the trustee, as well as any other moneys that may come into its hands on account of such sinking fund, shall be applied by it as promptly as practicable to the purchase of

bonds secured by this mortgage, provided the same can be bought at not more than one hundred and five per cent. and interest, but in case of the inability of the trustee to make such purchase, the trustee shall, at least thirty days before the next instalment of interest matures, draw by lot from the total number of the said bonds then outstanding, the numbers of so many bonds as the funds in its hands will suffice to purchase at the price above stated; and it shall thereupon give notice of its intention to purchase the bonds so drawn by advertisement, specifying the numbers thereof, and the time of purchase, published in a daily newspaper in the city of Baltimore and a daily newspaper in the city of Richmond twice a week for at least four weeks previous to such time of purchase, which shall be the day on which the then next instalment of interest shall be due, and on and after the day thus designated, upon the presentation and surrender at its office of such bonds, with all the unpaid coupons attached, the trustee shall purchase the same by paying to the holders thereof the coupons due at the time designated for the purchase, and a sum equal to one hundred and five per cent. of the principal; but from the day so fixed for purchase, interest upon each of said bonds so drawn and advertised shall cease to be paid by the mortgagor to the holder, unless there shall be a failure to purchase the same by the trustee upon presentation as aforesaid, on the terms hereinbefore specified, but after the purchase by the trustee of any bonds for the sinking fund, the mortgagor shall, in addition to said annual sum of not less than one and one-quarter per cent. of the bonds theretofore issued, continue to pay for the sinking fund the interest coupons on said bonds to the trustee until the maturity of the principal of the bonds, and, on purchase thereof for the sinking fund, the trustee shall mark the bonds, "purchased for the sinking (S6) fund," and the same shall not again be issued or transferred.

And this indenture further witnesseth that the Richmond Traction Company, the mortgagor aforesaid, doth hereby appoint its President, John Skelton Williams, as its attorney, for it and in its name and on its behalf, to acknowledge this indenture to be the act and deed of the said Richmond Traction Company before any officer authorized by the laws of the Commonwealth of Virginia to take said acknowledgement to the end that these presents may be duly recorded.

And the Maryland Trust Company, the trustee aforesaid, doth hereby appoint its President, J. Wilcox Brown, as its attorney, for it and in its name and on its behalf, to

acknowledge this indenture to be the act and deed of the said Maryland Trust Company, as trustee, before any officer authorized by the laws of the Commonwealth of Virginia to take said acknowledgment to the end that these presents may be duly recorded.

In witness whereof the parties hereto have hereunto signed their respective names by their presidents and affixed their respective corporate seals, and have caused these presents to be attested by the signatures of their respective secretaries the day and year the first aforesaid.

RICHMOND TRACTION COMPANY.

By JOHN SKELTON WILLIAMS, President.

Attest :

[Corporate Seal.] EVERETT WADDEY,
Secretary.

(87) Witness as to the Corporate Seal of the Richmond Traction Company and its signature by its president :

JAMES LYONS, JR.

GEO. WHITELOCK.

MARYLAND TRUST COMPANY.

By J. WILCOX BROWN, President.

Attest :

[Corporate Seal.] J. BERNARD SCOTT,
Secretary.

Witnesses as to the Corporate Seal of the Maryland Trust Company and its signature by its president :

GEO. WHITELOCK.

FELIX R. SULLIVAN.

STATE OF VIRGINIA. }
City of Richmond, } To-wit :

I, James Lyons, Jr., a notary public in and for the city of Richmond, in the State of Virginia, do hereby certify that John Skelton Williams, the President of the Richmond Traction Company, whose name is signed to the foregoing writing, bearing date on the first day of November, 1895, and who is named as attorney in the power of attorney contained therein to acknowledge the same on behalf of the said Richmond Traction Company, by virtue of the power and authority vested in him as President of the said company, and on him conferred by said power of

attorney, has acknowledged the same before me in my city aforesaid as the act and deed of said company. And I also certify that Everett Waddey, Secretary of said company, whose name is also signed thereto as secretary, has also acknowledged the same before me in my city aforesaid as the act and deed of said company, and that the (88) corporate seal of said company, which is affixed thereto, is the corporate seal of the Richmond Traction Company.

Given under my hand and seal of office this first day of November, 1895.

{ Notarial
Seal. }

JAMES LYONS, JR.,
Notary Public in and for the
City of Richmond.

Tax on seal,
Notarial fee,

\$1.00
1 00

\$2.00

Paid.

JAMES LYONS, JR., N. P.

STATE OF MARYLAND, } To-wit:
City of Baltimore, }

I, Felix R. Sullivan, a notary public in and for the city of Baltimore, in the State of Maryland, do hereby certify that J. Wilcox Brown, the President of the Maryland Trust Company, whose name is signed to the foregoing writing, bearing date on the first day of November, 1895, and who is named as attorney in the power of attorney contained therein, to acknowledge the same on behalf of the said Maryland Trust Company, by virtue of the power and authority vested in him as president of the said company, and on him conferred by said power of attorney, has acknowledged the same before me in my city aforesaid to be the act and deed of the said Maryland Trust Company.

Given under my hand and seal of office this fourth day of November, 1895.

{ Notarial
Seal. }

FELIX R. SULLIVAN,
Notary Public.

CITY OF RICHMOND, } To-wit:

In the office of the Court of Chancery for the said city, 4th day of November, 1895, this deed was presented, and,

with the certificates annexed, admitted to record at half-past eight o'clock P. M.

Teste :

CHAS. W. GODDIN, Clerk.

A copy—Teste :

CHAS. W. GODDIN, Clerk.

DEMURRER TO AMENDED AND SUPPLEMENTAL BILL.

(89)

Filed February 4th, 1896.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

L. H. Hyer,

vs.

Richmond Traction Company et als. } In Equity.

The demurrer of the defendants to the amended and supplemental bill of complaint of the said L. H. Hyer.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in manner and form, as the said L. H. Hyer hath therein set forth and alleged, demur to the said bill, and say that the same is not sufficient in law; and for causes of demurrer the said defendants show :

I. That it appears by the said L. H. Hyer's own showing on the face of his said bill that under the Constitution and laws of the United States this honorable court, on the equity side thereof, hath no jurisdiction of, and can take no cognizance of, the matters and things in said bill set forth; but that the said matters and things alleged and set forth by the said L. H. Hyer in said bill are, under the Constitution and laws of the United States, within the sole and exclusive jurisdiction of the courts of law which have jurisdiction of the parties and the subject matter, and are competent to afford a plain, adequate and complete relief.

II. That it appears on the face of the said bill that this honorable court hath no jurisdiction of the said bill, because the citizenship of the complainant and the several parties defendant, respectively, as shown by the said bill, bar the jurisdiction of this honorable court, as declared by (90) the Judiciary act and the acts of Congress in amendment thereof in such case made and provided.

III. That it appears on the face of the bill that the

complainant has a plain, complete and adequate remedy at law, if any he has.

IV. That the contract and agreement set forth in said bill as the sole cause of action of the said complainant is against public policy, and null and void; and no court of equity will enforce the same.

V. That the said bill of complaint is multifarious and defective for misjoinder of the other defendants with the defendant, P. B. Sheild, against whom alone the said L. H. Hyer has any cause of action, according to his own showing.

VI. That the said bill is demurrable upon its face, for the non-joinder as parties thereto of Wm. H. Duehay and the other associates of the said L. H. Hyer, who, according to his own showing, are jointly interested with said Hyer in the alleged cause of action set forth in his said bill.

VII. The plaintiff seeks to set aside the organization of the Richmond Traction Company, and deny its powers as a corporation, which can only be accomplished by a writ of *quo warranto* filed in the Circuit Court of Richmond, Virginia, by the Attorney-General of the State.

VIII. The plaintiff claims one-half of the franchise and profits of the Richmond Traction Company, and at the same time prays this court to enjoin the exercise of the said franchise by the said company, and thus seeks to prevent the making of the profits he claims a share in.

IX. The plaintiff seeks to have decreed him one-half of the franchise of the Richmond Traction Company, while he shows that he has never subscribed for one-half of its stock, or offered to so subscribe.

(91) Wherefore, and for divers other good causes of demurrer, appearing on the face of said bill, these defendants demur thereto, and they pray the judgment of this honorable court, whether they shall be compelled to make any answer to said bill; and they humbly pray to be hence dismissed, with their costs in this behalf sustained.

JOHN L. WILLIAMS,
JOHN L. WILLIAMS & SONS,
RICHMOND TRACTION COMPANY
AND OTHERS,

Defendant,
by W. W. HENRY and JAMES LYONS,
their Solicitors.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law and should be sustained.

W. W. HENRY,
JAMES LYONS,
of Counsel for the Defts.

UNITED STATES OF AMERICA. }
Eastern District of Virginia, } To-wit :

John L. Williams, Wm. M. Habliston and R. Lancaster Williams, being duly sworn, make oath and say that they are defendants in this cause and that the foregoing demurrer is not interposed for delay.

JOHN L. WILLIAMS,
W. M. HABLSTON,
R. LANCASTER WILLIAMS.

Subscribed and sworn to before me this 4th day of February, 1896, in my office at Richmond, Virginia, in said district.

McLAIN PLEASANTS,
U. S. Commissioner,
East. District of Virginia.

(92) And at another day, to-wit: At a Circuit Court as aforesaid, held as aforesaid, on the 11th day of February, 1896, the following order was entered, to-wit :

ORDER.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

L. H. Hyer
vs. } In Equity.
Richmond Traction Co. et als. }

On the motion of the defendants, by counsel, it is ordered that this cause be set down for argument, upon the original and amended and supplemental bills in this cause and the demurrers thereto, on Wednesday, the 1st day of April, 1896, at the court-room in the city of Richmond, Virginia.

NATHAN GOFF,
U. S. Circuit Judge.

(93) And at another day, to-wit: At a Circuit Court as foresaid, held as aforesaid, on the 6th day of April, 1896, the following order was duly entered of record, to-wit:

ORDER.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
EASTERN DISTRICT OF VIRGINIA.

L. H. Hyer

vs.

Richmond Traction Company et als. }

This cause came on this day to be heard on the petition of L. H. Hyer, complainant herein, this day tendered, asking for leave to amend the original, the amended and supplemental bills, heretofore filed in this cause, and was argued by counsel, the plaintiff being represented by Stiles & Holladay, and the defendant by W. W. Henry and James Lyons; on consideration whereof it is hereby ordered that said petition be filed and that the complainant have leave to amend the said bills, in the particulars set out in his said petition, which is hereby done.

It is further ordered that on the 6th day of May, 1896, in the United States Circuit Court room at Richmond, Va., at 10 o'clock A. M. of that day, the court will hear parties hereto on such matters relating to the cause as may then be properly considered.

NATHAN GOFF,

U. S. Circuit Judge.

April 6th, 1896.

(94) Complainant's petition, referred to in the foregoing order of April 6th, 1896, is in the words and figures following, to-wit:

PETITION.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

L. H. Hyer, Plaintiff,

vs.

Richmond Traction Company } In Equity.
et als., Defendants. }

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Virginia.

Your petitioner, L. H. Hyer, the complainant in the

equity cause now depending in this honorable court, under the short style stated above, respectfully represents that he desires to amend his original bill and his amended and supplemental bill, filed in the above styled cause, in the following manner, viz.:

1. That part of the original bill filed by your petitioner, which states the citizenship and residence of the parties plaintiff and defendant, is in the following words, to-wit:

"To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Virginia:

L. H. Hyer, a citizen of the State of Missouri, residing in Warrensburg, Johnson county, in the State of Missouri, brings his bill against the Richmond Traction Company, a corporation chartered under the laws of the State of Virginia, a citizen of the State of Virginia, having its residence or chief place of business in the City of Richmond, Virginia; Jno. W. Middendorf, residing in the City of Baltimore, in the State of Maryland, a citizen of the State of Maryland, and John L. Williams, John S. Williams, Everett Wadley, R. Shereffs, P. B. Shield, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, and Louis Euker, residing in the City of Richmond, in the State of Virginia, and citizens of the State of Virginia, Charles T. Child, residing in the County of Hanover, in the State of Virginia, a citizen of the State of Virginia, and Edmund Pendleton, residing in the County of Henrico, in the State of (95) Virginia, a citizen of the State of Virginia."

It will be observed that while your petitioner stated that all of the named defendants, save John W. Middendorf, are citizens of the State of Virginia and gave the name of the city or county in the State of Virginia in which each of the said defendants resides, your petitioner omitted to state that the said city of Richmond, county of Henrico and county of Hanover, are each and all situated within the Eastern District of Virginia. Your petitioner therefore desires to add the following words at the end of the above paragraph, copied from his original bill in this cause, viz. : (96) "And the said city of Richmond, in the State of Virginia, county of Hanover, in the State of Virginia and county of Henrico, in the State of Virginia, being situated in the Eastern District of Virginia"—or other apt words stating that fact.

2. Your petitioner desires to amend sub-divisions III, IV, V, VI, VII, VIII of his original bill filed in this cause by striking out certain words, figures and clauses and para-

graphs therein, and adding certain other words, figures, clauses and paragraphs in lieu thereof, so that said above-named sub-divisions, when the same shall have been thus amended, shall read as follows, viz. :

(97)

III.

RICHMOND CONDUIT CO.

This franchise, which passed both branches of the City Council, was approved by the Mayor on the 17th day of June, 1895, and was granted to your orator and his associates under the name and style of the "Richmond Conduit Railway Company." After the franchise had thus become a law, it was discovered that its terms, as originally prepared and submitted by your orator and recommended by the Committee on Streets, had been altered, without the approval of your orator, who declined to accept or to proceed under it in the form in which it was finally enacted and approved. Upon open conference before the Committee on Streets of the City Council, your orator was assured that the changes made in the paper had been made under the supposition or representation that they would be acceptable to him and that, as this proved not to be the case, amendments could and would be passed restoring the franchise to its original form; provided, your orator could and would procure the deposit by a certain date, in one of the banks of the city of Richmond, of the sum of \$10,000, upon conditions embodied in a paper to be prepared by the City Attorney. Your orator, therefore, on the 17th day of July, just one month after the ordinance had become a law, caused the deposit of \$10,000 to be made in the State Bank of Virginia, and then left the city and went North for conference with his associates and backers. He had given substantial and satisfactory guarantee, indeed precisely the guarantee required, of the good faith of himself and associates of the Richmond Conduit Railway Company and their earnest purpose to build the road; such guarantee moreover, as he was assured would induce the City Council to pass the proposed amendments to his franchise, restoring it to its original and approved form.

IV.

RICHMOND TRACTION CO.

During his visits to Richmond and conferences with Council Committees, with regard to his conduit ordinance, your orator became aware that certain parties were seeking to procure the grant of this franchise to them, under the

name and style of the "Richmond Traction Company." But these parties appeared to be without money or resources, and did not seem likely to accomplish anything. One P. B. Sheild, an attorney at law of the city, appeared to be at the head of this movement, or at least in charge of it before the City Council and its committees; but though your orator several times saw him and his associates, he and Mr. Sheild were never introduced to each other, and, so far as your orator knows, no efforts were made on either side to open communication up to the meeting of your orator and Mr. Sheild in New York, as hereinafter set out, on (98) the 9th day August, 1895.

Your orator's ordinance had passed both houses of the City Council and been approved by the Mayor, and though not at the time in a shape satisfactory to him, yet he had been assured and had every reason to believe that it would be put in this shape; indeed, he had given the guarantee required to make this practically certain, and the Committee on Streets had actually reported or recommended the most important of the desired amendments and that without hesitation or difficulty.

V.

MEETING WITH SHEILD.

During the early part of August, 1895, your orator was in the city of New York engaged in perfecting his arrangements for prompt and vigorous action under his conduit ordinance, as soon as it should be satisfactorily amended. On the morning of the 9th of August, when your orator entered the banking house of Stewart & Co., No. 40 Wall street, who had been advising with him, with a view of aiding and backing him financially in the prosecution of his enterprise, he was informed that Mr. P. B. Sheild, above mentioned, had been brought by his broker to Stewart & Co., that he had proposed to them to aid and back him in the prosecution of his Richmond Traction Company scheme; that indeed he was at that moment in another apartment of the banking house in conference with Mr. S. H. G. Stewart, the head of the firm. During the day Mr. Stewart had several interviews with the said Sheild and your orator separately. Mr. Stewart advised your orator that said Sheild had plead with him (Stewart) to get the promoters of the Richmond Traction scheme recognition in the organization of the Conduit Company, the said Sheild clearly and emphatically declaring that he desired to meet your orator for the purpose, if possible, of consolidating the interests of the Trac-

tion people, or those representing that interest, with those of the Conduit Company. The pleading for recognition and anxiety for a meeting was earnest and came from the Traction people and the said P. B. Sheild and associates, acting through the said P. B. Sheild, who declared that he had full power and authority in the premises to represent and speak for each and all of them. The said Stewart then advised your orator to shake hands with said Sheild and to unite with him upon one of the two ordinances—the Conduit or the Traction ordinance. Mr. Sheild and your orator, realizing the wisdom of this council, were then and there introduced by Mr. Stewart, and, after some conference, parted to meet later at your orator's hotel, having arrived at a general agreement that the promoters of the Conduit scheme, represented by your orator, and the promoters of the Traction scheme, represented by the said Sheild, would co-operate and share equally in the ownership, control and profits of the enterprise.

VI.

THE CONTRACT.

The said Sheild and your orator met, as arranged, in your orator's room in the Grand Hotel, about 5 o'clock in the evening, and, in that room and in the lobby, freely and fully conferred. The result of this conference was embodied in a contract which took the form of a joint letter from your orator and the said Sheild to S. H. G. Stewart, herein above mentioned, which letter is in the words and figures following, to-wit:

New York, August 9th, 1895.

S. H. G. Stewart, Esq.:

40 Wall street, city.

Dear Sir:

We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Shield, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses

may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

Yours very respectfully,

(Signed) L. H. HYER.

(Signed) PHIL. B. SHEILD.

(100) It will be observed that in entering into this contract your orator was acting in behalf of himself and associates, and the said Sheild in behalf of himself and associates. At the time your orator was authorized to represent, and did represent, all the parties interested in the Conduit Company's scheme, and the said Sheild stated that he had power of attorney from all the parties interested in the Traction Company's scheme, and he, the said Sheild, did actually represent them.

Not only does the letter above set out embody the express contract between these parties, legally unalterable by parol evidence, but, in point of fact, this contract was first written by the said Sheild; then suggestions were made by your orator, and, perhaps, by the said Sheild also; then the paper, as thus amended, was rewritten by Sheild, and, lastly, as rewritten, it was read by an acquaintance of your orator who was present, and both contracting parties, being questioned by him, not only stated that the contract was thoroughly understood by them, but each showed his thorough understanding and comprehension of it—the said Sheild stating substantially that it was an agreement providing for a consolidation of interests, each party to have equal ownership and control in the enterprise and an equal share of profits, but each party to be first repaid all actual outlay and expenses.

Mr. Hyer agreed that the Traction ordinance should

take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the city of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the city of Richmond the franchise set out in the said contract of August 9th, 1895, and your orator was to keep the \$10,000.00 in Richmond until the 17th day of August, 1895, but subject to the conditions set out in the said contract.

VII.

FULFILLMENT AND NOTICE.

Clearly, then, said Sheild understood the contract between him and your orator, and your orator now states and charges that he understood it precisely as Sheild did, and not only so, but your orator performed his part of it in the fullest measure. Said Sheild and his Traction Company associates have gotten all they bargained for from your orator; indeed, all they said they wanted, and it is easy to see what that was, and how vital to them.

(101) The Conduit people had already been granted a franchise by the City Council for a street railway on Broad street, with collateral lines, and they had \$10,000 on deposit, upon a basis satisfactory to the Street Committee, which was an assurance of the financial standing of your orator and his associates.

At this same interview, said Sheild asked your orator what names of his associates should be inserted in the Traction ordinance. He insisted that he must have your orator's name, and he also desired to use the names of one or two of your orator's associates whom he specified. Your orator could not, at that moment, give definite instructions, but the next day he wired his friends in Richmond, whither Sheild had returned, desiring them to see him, and to have inserted in the Traction ordinance your orator's name and the names of two of his friends and associates who were specified. For a day or two subsequent to the signing of said contract of August 9th, 1895, said Sheild and his associates several times wired your orator as to sundry details of the joint enterprise, especially urging him, by all means, to see that the \$10,000.00, on deposit in Richmond, should be detained there until the meeting of the Council—an indispensable service which your orator rendered, although not at the time having received the telegrams referred to. And not only so, but

your orator and his associates openly, publicly and fully carried out and performed each, all and every of the promises and covenants of your orator, in behalf of himself and associates, contained in said contract of August 9th, 1895.

And your orator here takes occasion to state that he applied for and obtained leave of court to amend this, his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees; not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895.

Your orator here and now states and charges, not only that no such impression was intended to be conveyed by the bill, but that nothing approximating to it in fact occurred. On the contrary, the entire history of the Broad street franchise before the City Council and its committees was a matter of the utmost publicity. The original Conduit Railway franchise of your orator had been fully considered and discussed before the Council and by the business community, and the proposed amendments of it were publicly offered, considered and adopted before the committee on streets, and then printed; and when the Traction franchise was applied for in place of the Conduit franchise, this also was openly done before the same committee; the (102) existence and substance of the contract of City, August 9th, being generally and fully known by the Council of Richmond, the committee on streets and the public generally, and in no way concealed or suppressed, and it being also well and thoroughly understood that the Conduit people and the Traction people had gotten together, upon the basis of this latter franchise, with the understanding that the two sides should have equal right and representation in the new company.

Your orator now charges that all promoters of the Traction scheme, who were interested in it at the date of the contract with Sheild, are *clearly bound* thereby. Said Sheild stated that he had power of attorney from each and every one of them; they put him forward, and he acted for them; they took the benefit, and they must yield the consideration.

But your orator is also further advised and charges that all who have come into the Traction Company since that date are likewise bound, for they, too, are benefited by

the consideration your orator gave, and, if they had not full personal knowledge, as some of them undoubtedly and all along had, they certainly *had legal notice* of your orator's rights. They knew enough to put them upon inquiry. Indeed, they either knew or they deliberately refused to know anything and everything with regard to your orator's rights and interests in the joint enterprise.

VIII.

BREAKING FAITH.

Your orator is at a loss to comprehend or even fully to realize the next chapter in this history. As above intimated, after executing the agreement of August 9th, he was detained one day in New York in perfecting his preparations for vigorous prosecution of the joint enterprise, and after that in Washington by serious and continuous illness. Hearing nothing from Richmond after Sheild's return there, the telegrams above mentioned not having reached him, about the 13th of August, the day before the Council was to meet to consider the Broadstreet franchise, your orator requested his associate, Wm. H. Duehay, to go at once to Richmond and find out what this silence meant. This said Duehay did, arriving in this city on the 14th, the very day of the Council meeting, and immediately interviewed Sheild, but without eliciting either explanation of his silence or satisfactory declaration as to his attitude and purposes toward your orator. While no intimation was given of a purpose to break faith with him, or to crowd him out, yet the situation was not satisfactory, and your orator was promptly so informed.

The Traction ordinance was duly passed by the Council, and Duehay being compelled to return to Washington, Sheild promised to write him fully, but did not do so, and said Duehay wired, and your orator both wired and wrote him for explanation and information, offering also to come (103) to Richmond if vitally necessary; but neither your orator nor Duehay received any reply. Meanwhile, his friends in Richmond wrote your orator that something was wrong, and that they could get no definite information as to what was going on.

Finally, on or about the 23d of August, certainly as soon as he was well able to travel, your orator arrived in Richmond, communicating in advance with his friends to arrange a conference with Sheild, sending him word immediately upon reaching the city as to his whereabouts, and expressing a willingness to meet any appointment he might make. Sheild at first said he was too busy to make

an appointment, but came in the evening to Ford's Hotel, where your orator was putting up, bringing with him one W. F. Jenkins, who had originally been associated with and represented by your orator, but who seemed then to be, and is believed now to be, arrayed with said Sheild against him.

(104) 3. Your orator desires to further amend his said original bill, near its conclusion, by inserting, just before the paragraph charging his exposure to irreparable injury, two brief paragraphs in the following words and figures, to-wit:

Your orator further avers and charges that the said Phil. B. Sheild is utterly and hopelessly insolvent, and that nothing could be made out of him by a judgment at law, or a decree for the payment of money.

Your orator further avers and charges that it is within the power of the defendants to specifically carry out and perform the said contract of August 9, 1895, according to its true meaning and intent as hereinbefore set out.

4. Your orator also desires to so amend his amended and supplemental bill filed in this cause, as to make his original bill, copied upon the face of the said amended and supplemental bill, read as the said original bill will read after it shall have been amended in the manner hereinbefore set out.

5. Your orator desires further to amend his said amended and supplemental bill by adding, immediately after the second paragraph on page 37 of the said bill as printed and filed, a new paragraph in the following words, viz:

And your orator now further and distinctly charges that said subscriptions were made without his knowledge, without notice to him of said meetings, or of said subscriptions; without any opportunity to him to subscribe to the capital stock of said Richmond Traction Company, with the design of excluding him from any opportunity to subscribe for any part of the said capital stock, and with the purpose of excluding him from any participation in the stock of said company, or its organization, or the determination of its policy.

(105) 6. Your orator desires further to amend his said amended and supplemental bill by adding, immediately after the first paragraph on page 46 of the said bill, as printed and filed, five new paragraphs in the following words and figures, viz:

Your orator is further advised and charges that the said mortgage or trust deed from the said Richmond Traction Company to the said Maryland Trust Company, as trustee, was made and executed in plain violation of the provisions of Section 1232 of the Code of Virginia, Edition 1887, which is in the following words and figures, to wit:

“Sec. 1232. Power to borrow money.—No company, unless expressly authorized by its charter, shall borrow money until there shall be paid up and expended or appropriated the whole amount of capital stock subscribed, with the exception only of losses by delinquent or insolvent stockholders. But the president and directors may borrow an amount not exceeding that part of the capital stock which is unsubscribed, and may issue certificates for the money so borrowed, and may make such certificates convertible, within a prescribed time, into stock of the company, at the pleasure of the holder.”

The said Richmond Traction Company claims to have been created by an ordinance of the Council of the City of Richmond, approved on the 28th day of August, 1895, a copy of which was filed with your orator's original bill in this cause, marked “Exhibit A with Bill,” which ordinance was passed pursuant to an Act of the General Assembly of Virginia, passed March 20th, 1860, entitled—“An act to authorize the Common Council of Richmond (106) to authorize persons to construct railroads in the streets of said city.” See Acts of Assembly of Virginia, 1859-'60, Chapter 214. But your orator is advised, and therefore charges, that such last mentioned act is unconstitutional and void so far as it undertakes to delegate to the City Council of the city of Richmond the authority to prescribe and define the powers and duties of the Richmond Traction Company; and your orator is also advised and charges that all the powers attempted to be conferred by the said act, on companies to be formed under it, save and except the power to construct railroads in the streets of said city are void, because they are not embraced or expressed within the title of said act, as required by Sec. 16, Article IV. of the Constitution of Virginia, in force at the time of the passage of the said act, which said section of the Constitution of Virginia is in the following words and figures, to-wit:

“No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended by reference to its title, but the act revived or section amended shall be re-enacted and published at length.”

Your orator therefore charges that the said Richmond Traction Company was not expressly authorized by its charter to borrow money, and that the whole amount of its subscribed capital stock had not been paid up and expended or appropriated with the exception of losses by delinquent or insolvent stockholders when the foregoing trust deed or mortgage was executed. On the contrary, your orator avers that the entire capital stock of said company was subscribed for by John L. Williams & Sons and their associates, as herein stated, and that no part of said capital stock has been paid, but the whole amount thereof still remains unpaid. And your orator avers and charges that in such circumstances the said Richmond Traction Company was prohibited by law from borrowing money or executing any deed of trust or mortgage to secure the same.

(107) Your petitioner respectfully represents that he desires and asks leave to amend his original and amended and supplemental bills filed in this cause, as above set out, for the purpose of emphasizing the openness, publicity and fairness with which the contract of August 9, 1895, between the said L. H. Hyer and Phil. B. Sheild, a copy of which was filed with the original bill, was carried into effect before the City Council and its committees; not because he considered his said bills fairly construed as being defective in this regard, but because they contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895.

Your petitioner here and now respectfully represents and avers, not only that no such impression was intended to be conveyed by the said bills, but that nothing approximating to it in fact occurred.

On the contrary, the entire history of the Broad street franchise before the City Council and its committees was a matter of the utmost publicity. The original Conduit Railway franchise of your orator had been fully considered and discussed before the Council and by the business community, and the proposed amendments of it were publicly offered, considered and adopted before the Committee on Streets, and then printed; and, when the Traction franchise was applied for in place of the Conduit franchise, this was also openly done before the same committee; the existence and substance of the contract of city, August 9th, being generally and fully known by the Council of Richmond, the Committee on Streets and the public generally, and in no way concealed or suppressed, and it being also

well and thoroughly understood, that the Conduit people and the Traction people had gotten together, upon the basis of this latter franchise, with the understanding that the two sides should have equal right and representation in the new company.

(108) Your petitioner further represents that he has recently been informed, and upon investigation has ascertained, that the said Phil. B. Sheild was, on the 30th day of October, 1895, and still is hopelessly insolvent. This fact has an important bearing upon the realization of the rights of your petitioner, and is reason why he is without remedy save in a Court of Equity. Your orator, therefore, wishes to charge and prove the insolvency of the said Phil. B. Sheild.

Your petitioner further represents that he intended by the language of his original bill to aver and charge that it is within the power of the defendants specifically to carry out and perform the said contract of August 9th, 1895, according to its true meaning and intent, as hereinbefore set out; but it is possible that the defendants may attempt to set up that your petitioner has not clearly and distinctly charged this fact, and your petitioner, therefore, desires to amend his said original bill in this regard and to aver and charge this fact in plain and definite language.

Now, as to the proposed amendments to the said amended and supplemental bill your petitioner respectfully represents that he intended to make plain by the language used on pages 36, 37, 38 and 39 of his said amended and supplemental bill (amongst other things thereon stated,) that no books for subscription to the capital stock of the Richmond Traction Company were opened after the notice and in the mode required by the laws of Virginia; that all meetings held for the purpose of receiving subscriptions to the capital stock of the said company were held in violation of the laws of Virginia; that all subscriptions to said capital stock were made without the knowledge of your petitioner, without notice to him of said meetings, or of said subscriptions; without an opportunity to him to subscribe for the capital stock of the said company, with the design of excluding him from any opportunity to subscribe to any part of the said capital stock, and with the purpose of excluding him from any participation in the stock of the said company or its organization, or the determination of its policy; but the "IX Head Grounds of Demurrer" filed by the defendants has attempted to twist and distort the meaning, in this regard, intended to be conveyed by your petitioner, and he, therefore, desires to amend his said (109) amended and supplemental bill by stating the fact

above set out in language which cannot be misconstrued. Your petitioner, therefore, asks leave to add immediately after the second paragraph on page 37 of the last-named bill, a new paragraph in the language hereinbefore set out.

Your petitioner further represents that the original and amended and supplemental bills filed in this cause, together with the exhibits and the Constitution and laws of the State of Virginia, of which this court will take judicial notice, may possibly set up the matters which your petitioner desires to present for the consideration of this honorable court, by the five paragraphs hereinbefore set out, which your petitioner asks leave to add immediately after the first paragraph on page 46 of the last-named bill; but your petitioner's attention was only called to these matters a few days ago, and they are of such far reaching and vital importance that he deems it to be both his right and his duty to ask leave of this honorable court to amend his said amended and supplemental bill, by the insertion of the five paragraphs aforesaid, in order that these matters may be clearly and distinctly presented by the pleadings.

Your petitioner further represents that, in the first paragraph of his amended and supplemented bill, to be found on pages 1 and 2, he omitted to state that the cities of Richmond and Petersburg, and the counties of Hanover and Henrico, are situated within the Eastern District of Virginia. He, therefore, asks leave to amend his last-named bill by adding the following words at the end of the said first paragraph on page 2, viz.: "And the said City of Richmond, the City of Petersburg, the county of Henrico and the county of Hanover being situated in the State of Virginia, and in the Eastern District of the State of Virginia."

Your petitioner therefore prays that leave may be granted him to amend his original bill and his amended and supplemental bill filed in this cause, in the manner hereinbefore set out; and your petitioner prays for such other further general and complete relief as the nature of his case may require and to equity may seem meet.

And your petitioner will ever pray, &c.

L. H. HYER.

By STILES & HOLLADAY,

His Counsel.

STILES & HOLLADAY,

Solicitors for Petitioner.

(110) Original bill in the case of L. H. Hyer against Richmond Traction Company and others, as it reads when reprinted with amendments allowed to be made by decree entered therein on the 6th day of April, 1896.

STILES & HOLLADAY,
Solicitors for Complainant.

ORIGINAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Hyer	}
<i>vs.</i>	
Richmond Traction Company and others.	}

Filed April 18th, 1896.

M. F. PLEASANTS,
Clerk.

(For this original bill as amended and reprinted see paper next following, upon the face of which it is reprinted in full).

AMENDED AND SUPPLEMENTAL BILL.

(111) Amended and Supplemental Bill in the case of L. H. Hyer against Richmond Traction Company and others, as it reads when reprinted with amendments allowed to be made by decree entered on the 6th day of April, 1896.

STILES and HOLLADAY,
Solicitors for Complainant.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

Hyer
v.
Richmond Traction Company and others. }

Filed April 18th, 1896.

M. F. PLEASANTS, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
(112) EASTERN DISTRICT OF VIRGINIA.

Hyer
v.
Richmond Traction Company and others. }

To the Honorable Judges of the Circuit Court of the
United States for the Eastern District of Virginia :

L. H. Hyer, a citizen of the State of Missouri, residing in Warrensburg, Johnson county, in the State of Missouri, brings this bill against the Richmond Traction Company, a corporation chartered under the laws of the State of Virginia, having its residence or chief place of business in the city of Richmond, Virginia, a citizen of the State of Virginia ; John W. Middendorf and Henry A. Parr, residing (113) in the city of Baltimore, in the State of Maryland, citizens of the State of Maryland ; John L. Williams, John S. Williams, Ro. Lancaster Williams, the three last named both individually and as partners doing business under the name and style of John L. Williams & Sons, Everett Waddey, R. Shereffs, P. B. Sheild, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Louis Euker and E. B. Addison, residing in the city of Richmond, in the State of Virginia, citizens of the State of Virginia ; Charles T. Child, residing in the county of Hanover, in the State of Virginia, a citizen of the State of Virginia ; Edmund Pendleton, residing in the county of Henrico, in the State of

Virginia, a citizen of the State of Virginia; William M. Habliston, residing in the city of Petersburg, in the State of Virginia, a citizen of the State of Virginia, and the Maryland Trust Company, a corporation chartered under the laws of the State of Maryland, a citizen of the State of Maryland, having its residence or chief place of business in the city of Baltimore, Maryland. And the said city of Richmond, the city of Petersburg, the county of Henrico and the county of Hanover being situated in the State of Virginia and in the Eastern District of the State of Virginia.

And thereupon your orator complains and says as follows:

MATTER IN DISPUTE.

That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars (\$2,000); indeed, vastly exceeds said sum or value.

ORIGINAL BILL AND PROCEEDINGS THEREON.

Your orator further sheweth unto your honors that on the 30th day of October, 1895, he filed his original bill in this cause against all the defendants herein above named, except Henry A. Parr, Ro. Lancaster Williams, E. B. Addison, William M. Habliston and the Maryland Trust Company, and that subpoenas were on the same day issued in the mode prescribed by law, returnable to March Rules, 1895, requiring all the defendants named in the bill to answer the allegations thereof, that, in pursuance of an order (114) made in this cause on the 14th day of November, 1895, by one of the judges of this Honorable Court, your orator immediately amended his said bill as authorized by said order, and that said original bill as amended, together with the exhibits filed therewith, as in the following words and figures, to-wit:

ORIGINAL BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
EASTERN DISTRICT OF VIRGINIA, IN THE
FOURTH JUDICIAL CIRCUIT.

L. H. Hyer, Plaintiff,

vs.

The Richmond Traction Company, a corporation chartered under the laws of the State of Virginia; John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Shield, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton, and Louis Euker, Defendants.

To the Honorable Judges of the Circuit Court of the
United States of the Eastern District of Virginia:

L. H. Hyer, a citizen of the State of Missouri, residing in Warrensburg, Johnson county, in the State of Missouri, brings this bill against the Richmond Traction Company, a corporation chartered under the laws of the State of Virginia, a citizen of the State of Virginia, having its residence or chief place of business in the City of Richmond, Virginia; Jno. W. Middendorf, residing in the City of Baltimore, in the State of Maryland, a citizen of the State of Maryland, and John L. Williams, John S. Williams, Everett (115) Waddey, R. Shereffs, P. B. Shield, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, and Louis Euker, residing in the City of Richmond, in the State of Virginia, and citizens of the State of Virginia, Charles T. Child, residing in the County of Hanover, in the State of Virginia, a citizen of the State of Virginia, and Edmund Pendleton, residing in the County of Henrico, in the State of Virginia, a citizen of the State of Virginia. And the said city of Richmond, in the State Virginia, county of Hanover, in the State of Virginia, and county of Henrico, in the State of Virginia, being situated in the Eastern District of Virginia.

And thereupon your orator complains and says as follows:

That the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of two thousand dollars (\$2,000.00); indeed vastly exceeds said sum or value.

II.

INDUCEMENT.

Your orator respectfully sheweth unto your honors, that he is by profession a civil engineer, and has for some years past been engaged in projecting and constructing street railways in various cities of the United States, being sometimes called to inspect and report upon fields for such enterprises, and again, himself calling the attention of capitalists and investors to what he considered favorable fields for investments in such directions.

For some years past your orator has had his attention more and more directed to Broad street and connecting streets in the City of Richmond, Va., as an attractive and promising field for a street railway; and, having secured the co-operation or assurance of adequate capital, he, last spring, made application to the Council of the City of Richmond for an appropriate franchise which—after repeated visits to the city, prolonged and arduous efforts, and the expenditure of a large sum, in traveling, hotel bills, counsel fees and other expenses—he succeeded in securing—the sum so expended being between three thousand five hundred dollars (\$3,500.00) and four thousand dollars (\$4,000.00).

III.

RICHMOND CONDUIT CO.

This franchise, which passed both branches of the City Council, was approved by the Mayor on the 17th day of June, 1895, and was granted to your orator and his associates under the name and style of the "Richmond Conduit Railway Company." After the franchise had thus become a law, it was discovered that its terms, as originally prepared and submitted by your orator and recommended by the Committee on Streets, had been altered, without the approval of your orator, who declined to accept or to proceed under it in the form in which it was finally enacted and approved. Upon open conference before the Committee on Streets of the City Council, your orator was assured that the changes made in the paper had been made under the supposition or representation that they would be acceptable to him and that, as this proved not to be the case, amendments could and would be passed restoring the franchise to its original form; provided, your orator could and would procure the deposit by a certain date, in one of the banks of the city of Richmond, of the sum of \$10,000, upon condi-

tions embodied in a paper to be prepared by the City Attorney. Your orator, therefore, on the 17th day of July, just one month after the ordinance had become a law, caused the deposit of \$10,000 to be made in the State Bank of Virginia, and then left the city and went North for conference with his associates and backers. He had given substantial and satisfactory guarantee, indeed precisely the guarantee required, of the good faith of himself and associates of the Richmond Conduit Railway Company and their earnest purpose to build the road; such guarantee moreover, as he was assured would induce the City Council to pass the proposed amendments to his franchise, restoring it to its original and approved form.

IV.

RICHMOND TRACTION Co.

During his visits to Richmond and conferences with Council Committees, with regard to his conduit ordinance, your orator became aware that certain parties were seeking to procure the grant of this franchise to them, under the name and style of the "Richmond Traction Company." But these parties appeared to be without money or resources, and did not seem likely to accomplish anything. One P. B. Sheild, an attorney at law of the city, appeared to be at the head of this movement, or at least in charge of it before the City Council and its committees; but though your orator several times saw him and his associates, he and Mr. Sheild were never introduced to each other, and, so far as your orator knows, no efforts were made on either side to open communication up to the meeting of your orator and Mr. Sheild in New York, as hereinafter set out, on the 9th day August, 1895.

Your orator's ordinance had passed both houses of the City Council and been approved by the Mayor, and though not at the time in a shape satisfactory to him, yet he had been assured and had every reason to believe that it would be put in this shape; indeed, he had given the guarantee required to make this practically certain, and the Committee on Streets had actually reported or recommended the most important of the desired amendments and that without hesitation or difficulty.

V.

MEETING WITH SHEILD.

(118) During the early part of August, 1895, your orator was in the city of New York engaged in perfecting his ar-

rangements for prompt and vigorous action under his conduit ordinance, as soon as it should be satisfactorily amended. On the morning of the 9th of August, when your orator entered the banking house of Stewart & Co., No. 40 Wall street, who had been advising with him, with a view of aiding and backing him financially in the prosecution of his enterprise, he was informed that Mr. P. B. Sheild, above mentioned, had been brought by his broker to Stewart & Co., that he had proposed to them to aid and back him in the prosecution of his Richmond Traction Company scheme; that indeed he was at that moment in another apartment of the banking house in conference with Mr. S. H. G. Stewart, the head of the firm. During the day Mr. Stewart had several interviews with the said Sheild and your orator separately. Mr. Stewart advised your orator that said Sheild had plead with him (Stewart) to get the promoters of the Richmond Traction scheme recognition in the organization of the Conduit Company, the said Sheild clearly and emphatically declaring that he desired to meet your orator for the purpose, if possible, of consolidating the interests of the Traction people, or those representing that interest, with those of the Conduit Company. The pleading for recognition and anxiety for a meeting was earnest and came from the Traction people and the said P. B. Sheild and associates, acting through the said P. B. Sheild, who declared that he had full power and authority in the premises to represent and speak for each and all of them. The said Stewart then advised your orator to shake hands with said Sheild and to unite with him upon one of the two ordinances—the Conduit or the Traction ordinance. Mr. Sheild and your orator, realizing the wisdom of this council, were then and there (119) introduced by Mr. Stewart, and, after some conference, parted to meet later at your orator's hotel, having arrived at a general agreement that the promoters of the Conduit scheme, represented by your orator, and the promoters of the Traction scheme, represented by the said Sheild, would co-operate and share equally in the ownership, control and profits of the enterprise.

VI.

THE CONTRACT.

The said Sheild and your orator met, as arranged, in your orator's room in the Grand Hotel, about 5 o'clock in the evening, and, in that room and in the lobby, freely and fully conferred. The result of this conference was embodied in a contract which took the form of a joint let-

ter from your orator and the said Sheild to S. H. G. Stewart, herein above mentioned, which letter is in the words and figures following, to-wit :

New York, August 9th, 1895.

S. H. G. Stewart, Esq. :

40 Wall street, city.

Dear Sir :

We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Shield, of Richmond, Va., have this day entered into the following agreement : That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement : That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for (120) said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895 ; and further, it is agreed that the application and franchise to be presented to the Common Council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

Yours very respectfully,

(Signed) L. H. HYER.

(Signed) PHIL. B. SHEILD.

It will be observed that in entering into this contract your orator was acting in behalf of himself and associates, and the said Sheild in behalf of himself and associates. At the time your orator was authorized to represent, and did represent, all the parties interested in the Conduit Com-

pany's scheme, and the said Sheild stated that he had power of attorney from all the parties interested in the Traction Company's scheme, and he, the said Sheild, did actually represent them.

(121) Not only does the letter above set out embody the express contract between these parties, legally unalterable by parol evidence, but, in point of fact, this contract was first written by the said Sheild; then suggestions were made by your orator, and, perhaps, by the said Sheild also; then the paper, as thus amended, was rewritten by Sheild, and, lastly, as rewritten, it was read by an acquaintance of your orator who was present, and both contracting parties, being questioned by him, not only stated that the contract was thoroughly understood by them, but each showed his thorough understanding and comprehension of it—the said Sheild stating substantially that it was an agreement providing for a consolidation of interests, each party to have equal ownership and control in the enterprise and an equal share of profits, but each party to be first repaid all actual outlay and expenses.

Mr. Hyer agreed that the Traction ordinance should take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the city of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the city of Richmond the franchise set out in the said contract of August 9th, 1895, and your orator was to keep the \$10,000.00 in Richmond until the 17th day of August, 1895, but subject to the conditions set out in the said contract.

VII.

FULFILLMENT AND NOTICE.

Clearly, then, said Sheild understood the contract between him and your orator, and your orator now states and charges that he understood it precisely as Sheild did, and not only so, but your orator performed his part of it in the fullest measure. Said Sheild and his Traction Company associates have gotten all they bargained for from your orator; indeed, all they said they wanted, and it is easy to see what that was, and how vital to them.

(122) The Conduit people had already been granted a franchise by the City Council for a street railway on Broad street, with collateral lines, and they had \$10,000 on deposit, upon a basis satisfactory to the Street Committee,

which was an assurance of the financial standing of your orator and his associates.

At this same interview, said Sheild asked your orator what names of his associates should be inserted in the Traction ordinance. He insisted that he must have your orator's name, and he also desired to use the names of one or two of your orator's associates whom he specified. Your orator could not, at that moment, give definite instructions, but the next day he wired his friends in Richmond, whither Sheild had returned, desiring them to see him, and to have inserted in the Traction ordinance your orator's name and the names of two of his friends and associates who were specified. For a day or two subsequent to the signing of said contract of August 9th, 1895, said Sheild and his associates several times wired your orator as to sundry details of the joint enterprise, especially urging him, by all means, to see that the \$10,000.00, on deposit in Richmond, should be detained there until the meeting of the Council—an indispensable service which your orator rendered, although not at the time having received the telegrams referred to. And not only so, but your orator and his associates openly, publicly and fully carried out and performed each, all and every of the promises and covenants of your orator, in behalf of himself and associates, contained in said contract of August 9th, 1895.

And your orator here takes occasion to state that he applied for and obtained leave of court to amend this, his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees; not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose (123) and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895.

Your orator here and now states and charges, not only that no such impression was intended to be conveyed by the bill, but that nothing approximating to it in fact occurred. On the contrary, the entire history of the Broad street franchise before the City Council and its committees was a matter of the utmost publicity. The original Conduit Railway franchise of your orator had been fully considered and discussed before the Council and by the business community, and the proposed amendments of it were publicly offered, considered and adopted before the committee on streets, and then printed; and when the Traction frau-

chise was applied for in place of the Conduit franchise, this also was openly done before the same committee; the existence and substance of the contract of City, August 9th, being generally and fully known by the Council of Richmond and the public generally, and in no way concealed or suppressed, and and it being also well and thoroughly understood by the committee on streets that the Conduit people and the Traction people had gotten together, upon the basis of this latter franchise, with the understanding that the two sides should have equal right and representation in the new company.

Your orator now charges that all promoters of the traction scheme, who were interested in it at the date of the contract with Sheild, are *clearly bound* thereby. Said Sheild stated that he had power of attorney from each and every one of them; they put him forward, and he acted for them; they took the benefit, and they must yield the consideration.

But your orator is also further advised and charges that all who have come into the Traction Company since that date are likewise bound, for they, too, are benefited by (124) the consideration your orator gave, and, if they had not full personal knowledge, as some of them undoubtedly and all along had, they certainly *had legal notice* of your orator's rights. They knew enough to put them upon inquiry. Indeed, they either knew or they deliberately refused to know anything and everything with regard to your orator's rights and interests in the joint enterprise.

VIII.

BREAKING FAITH.

Your orator is at a loss to comprehend or even fully to realize the next chapter in this history. As above intimated, after executing the agreement of August 9th, he was detained one day in New York in perfecting his preparations for vigorous prosecution of the joint enterprise, and after that in Washington by serious and continuous illness. Hearing nothing from Richmond after Sheild's return there, the telegrams above mentioned not having reached him, about the 13th of August, the day before the Council was to meet to consider the Broad-street franchise, your orator requested his associate, Wm. H. Duchay, to go at once to Richmond and find out what this silence meant. This said Duchay did, arriving in this city on the 14th, the very day of the Council meeting, and immediately interviewed Sheild, but without eliciting either explanation of his silence or satisfactory declaration as to

his attitude and purposes toward your orator. While no intimation was given of a purpose to break faith with him, or to crowd him out, yet the situation was not satisfactory, and your orator was promptly so informed.

The Traction ordinance was duly passed by the Council, and Duchay being compelled to return to Washington, Sheild promised to write him fully, but did not do so, and said Duchay wired, and your orator both wired and wrote him for explanation and information, offering also to come (125) to Richmond if vitally necessary; but neither your orator nor Duchay received any reply. Meanwhile, his friends in Richmond wrote your orator that something was wrong, and that they could get no definite information as to what was going on.

Finally, on or about the 23d of August, certainly as soon as he was well able to travel, your orator arrived in Richmond, communicating in advance with his friends to arrange a conference with Sheild, sending him word immediately upon reaching the city as to his whereabouts, and expressing a willingness to meet any appointment he might make. Sheild at first said he was too busy to make an appointment, but came in the evening to Ford's Hotel, where your orator was putting up, bringing with him one W. F. Jenkins, who had originally been associated with and represented by your orator, but who seemed then to be, (126) and is believed now to be, arrayed with said Sheild against him.

IX.

OPEN RUPTURE AND LINES DRAWN.

The conference took place about 5 or 6 P. M., not in the hotel, but on the steps of the City Hall opposite; and in the course of the interview your orator forced said Sheild to declare himself. He then openly admitted that "he had made other arrangements;" in other words, he had dropped your orator and his associates.

It is important to note that this was the first communication your orator had received from Sheild since the execution of the contract, on August 9th; that it was the first intimation received from him, or from any one on his side, that it was not his purpose to carry out said contract in good faith, and that this intimation was given nearly ten days after the Council had passed the Traction ordinance, and passed it under the circumstances above detailed, and only three days before the Board of Aldermen concurred in this action. Repudiation of such obligations at such time and under such circumstances, struck

your orator dumb with amazement, yet not quite so dumb that he did not find words to express his opinion of such treatment.

Your orator was yet far from well. He had not been able to confer with his former friends in Richmond, and did not know to what extent they had deserted him or been bought off from him. Nor does he know this even now, though it is abundantly clear that some of them have been taken care of. As above stated, the Council had acted, and the Aldermen were evidently about to concur in their action. Your orator has been deserted by some of his friends, and had little time or opportunity for conference with others. But the crisis was upon him, and whatever was to be done must be done quickly.

(127) Sheild, however, did make one suggestion that seemed not utterly devoid of promise, and which, therefore, required delay. He stated that he would call a meeting of his associates at a given hour the next morning, Saturday, the 24th of August, and it would then be finally determined what settlement, if any, they would offer. Accordingly your orator held his hands, awaiting the event; but the meeting was not held at the appointed hour, nor at a subsequent hour to which it was said to have been postponed.

When this last faint prospect of just treatment had faded absolutely away, there appeared to be but one thing remaining to your orator, and that was to give such notice as he then could of his rights and claims; such notice as would be most likely, in the brief time intervening, to reach the unknown parties, if any, who had become interested in the Traction enterprise since the 9th of August, the date of the contract at the Grand Hotel. This your orator did, by publishing in the State newspaper on Monday, the 26th of August, the very day the Aldermen acted, a statement in the words and figures following, to-wit:

"Mr. Hyer's Charges.

DISAGREEMENT AMONGST TRACTION COMPANY'S PEOPLE.—THREATENS TO BRING SUIT.

Mr. L. H. Hyer, one of the interested parties of the Richmond Conduit Company, and the fully authorized attorney and agent of that company, was seen by a reporter of the *State* and was asked if he was interested in the present Traction Company's franchise, now before the Board of Aldermen. To which he replied that he had a

contract with the Traction Company for one-half interest of their franchise, when such franchise was granted.

What is the consideration of this contract you hold?

(128) I was to cause the withdrawal of the Richmond Conduit Company's application for franchise in favor of the Traction Company, which was done in due form before the Street Committee. There are a few other minor details, all of which have been complied with.

Is the Traction Company under contract with anyone else?

I am reliably informed they are.

What do you know of these other contracts?

One is with Stewart & Co., bankers, No. 40 Wall street, New York, who, I am informed, hold a binding proposition for one-third interest in the franchise, and I have reason to believe that an effort will be made on the part of Stewart & Co. to hold the Traction Company to this proposition. I am also informed that on the 19th of August a contract was entered into with W. F. Jenkins, the terms of which, it is said, are that he is to have about one-half interest in the franchise for his services in securing the said franchise. It has also been stated to me that the company has agreed to turn over to certain bankers of this city the greater portion of this franchise for financiering the same.

What is your idea of the outcome of these complications?

I can only answer for my associates and myself. If the Board of Aldermen pass the franchise to-night, as I hope and believe they will, it is my intention to retain able counsel before leaving the city to prevent any further transaction on the part of the Traction Company, from bond or stock transfers, until they have complied with the terms of the contract.

I should infer from the above that there is lack of harmony in the Traction Company.

My impression is that all of these conflicting contracts have caused discord among the parties at interest, and I am afraid these complications will lead to litigation which (129) will prove fatal to the enterprise, which I will regret to see with my financial interests at stake.

I have just received a telegram from Stewart & Co., of 40 Wall street, New York, saying they have a binding contract, dated August 9th."

Your orator is now able to say that, before the Traction franchise became a law, this publication undoubtedly reached the parties whom it was most important to affect,

with notice of his rights; for the gentleman who is now president of that company, to-wit: John S. Williams, Esq., not only read your orator's card, but answered it in the public prints by a statement which evidenced the fullest notice of his claims, while almost contemptuously denying their validity, a statement which, as it seems to your orator, not only forever closes the mouth of the Traction Company on the subject of *notice*, but well illustrates the recklessness and violence with which claims such as are set out in this bill may be characterized by young gentlemen in too hot haste to score *success* to waste time in that patient hearing and careful investigation unavoidable by him who would do *justice*. The following is the statement referred to:

MR. HYER ANSWERED.

Commenting on Mr. Hyer's statement in last evening *State*, Mr. John Skelton Williams said:

"I never heard of Mr. Hyer until he came out in last evening's *State* with those preposterous statements. I immediately took the matter in hand to see whether there was the slightest foundation for them, and was not long in satisfying myself that his claims could not be sustained; that his action was based on the flimsiest assumptions, and was probably inspired by the enemies of the Traction Company, who hoped to spring this surprise last evening at a critical time, with the object of casting doubts upon (130) the plans and purposes of the Richmond Traction Company. His statements are not worthy of any attention.

"Will his threat of employing counsel to defend his rights in the matter interfere in any way with your plans? was asked Mr. Williams. 'Not in the slightest degree,' he replied. It may really be said we have already begun our work, that is to say, the office work, the engineering work. The preparation of plans, and so forth, is already now well under way, and very soon after the Mayor attaches his name to the ordinance, and it becomes a law, the actual physical construction of the road will be at once begun, and pushed to completion much more rapidly than the time allowed in our franchise. We shall pay no more attention to Mr. Hyer than we would to some unconcerned and disinterested person who might appear on the scene now for the first time and request a gratuitous interest in our enterprise."

(From the *State* of August 27th, 1895.)

(131) These publications your orator followed up by serving

upon every one named in the Traction Company's ordinance, as passed by both houses of the City Council and approved by the Mayor (a copy of which as published, is herewith filed, marked Exhibit "A," and prayed to be read and taken as part hereof), formal notice in words and figures following, to-wit:

Richmond, Va., September 3d, 1895.

To John W. Middendorf, John L. Williams, Everett Waddey, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins, and through them, to each and every party, who on or since the ninth day of August, 1895, has been associated with them, or with any or with either of them, in the premises.

Take notice, that L. H. Hyer, in behalf of himself and associates, claims to be entitled to a full one-half interest in the franchise recently granted by the City Council of the city of Richmond, Virginia, to Jno. W. Middendorf, John L. Williams, Everett Waddey, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins and associates, to build and operate an electric street-car line in the said city, on Broad and other streets—said interest being claimed under a contract bearing date August ninth, 1895, entered into between P. B. Sheild and associates, through P. B. Sheild, and L. H. Hyer, in behalf of himself and associates—one original of which is in the hands of said P. B. Sheild and one is in the hands of Stiles & Holliday, attorneys at law, 1014 east Main St., Richmond, Virginia, the latter being open to your inspection; and, if the rights of the said L. H. Hyer and associates are not recognized and conceded, that they intend forthwith to apply to the courts to enforce their rights in the premises.

(132) This formal notice is not intended as an implication or even admission that you have not all along been aware of the rights and claims above asserted.

L. H. HYER.

By STILES & HOLLADAY,
Attorneys.

Your orator has already stated to the court that when he entered into the contract of August 9th with Sheild and associates, he did so on behalf of himself and associates—the promoters of the Richmond Conduit Railway Company's scheme. He deems it proper to state that since that date, all his then associates, with the exception of said W. F. Jenkins, A. B. Guigon, Edmund Pendleton and Louis Euker—the last three of whom required your

orator to execute a paper recognizing the said Jenkins as trustee and representative of their rights and interests in the enterprise—have made legal transfer and assignment of their rights and interests in the premises to him; so that, with the exception just above mentioned and just below considered, your orator, in his own right and behalf, now controls, represents, embodies and respectfully presses before the court the right in law and equity to everything which said contract of August 9th assured to all the promoters of the conduit scheme, to-wit: a full one-half interest therein and thereunder. He deems it proper also to add that all his said assignors, at the date of said contract, and at the dates of their respective assignments to him, and at the date of the institution of this suit, were and that they still are, citizens of States of this Union other than the State of Virginia.

As to the rights and interests, at the date of said contract with Sheild, vested in W. F. Jenkins and W. F. Jenkins, trustee, your orator now distinctly states and charges that said rights and interests are not only comparatively insignificant, but that they have no longer any legal or valid existence, as against or in diminution of the (133) rights and interests of your orator. First, because, as he believes and charges, said Jenkins has abandoned said rights and interests and makes no claim to them. Not seeing how it was possible under the circumstances that he could make such claim, your orator, prior to the institution of this suit and with a view thereto, addressed and delivered to said Jenkins a communication in the words and figures following, to-wit:

ROBERT STILES.

ADDISON L. HOLLIDAY,

Late Judge Chancery Court of Richmond.

Law Office of

STILES & HOLLADAY,

1014 E. Main Street.

Richmond, Va., Sept. 18th, 1895.

W. F. Jenkins, Esq., City.

Dear Sir—As counsel for L. H. Hyer we write to ask whether you claim any rights of any character under the paper handed you as trustee by L. H. Hyer on the 17th day of July, 1895. If you assert any claim of any character under this paper, please furnish us with a copy of the same or name an early time and place when and where we can meet you and read the paper in question.

Yours truly,

(Signed) STILES & HOLLADAY.

To this communication your orator has received no reply; but he now goes further and charges that, even if said Jenkins should advance such claim, it would be manifestly inconsistent, null and void, said Jenkins being not only one of the incorporators of the Richmond Traction Company, but having thoroughly cast his lot with said Sheild and his traction people whose entire position is (134) based upon the repudiation and denial of any and all right or claim in your orator or those represented by him in the contract of August 9th.

Your orator further avers and charges that the said Phil B. Sheild is utterly and hopelessly insolvent, and that nothing could be made out of him by a judgment at law, or decree for the payment of money.

Your orator further avers and charges that it is within the power of the defendants to specifically carry out and perform the said contract of August 9, 1895, according to its true meaning and intent as hereinbefore set out.

And now, in conclusion and upon the basis of the foregoing recital of facts, your orator distinctly claims and charges, and repeats the claim and charge, that he is fairly and justly entitled to a full one-half interest in the Traction Company's enterprise and franchise, that he has been unfairly and unjustly defrauded of the same, and that he will be exposed to irreparable injury, unless the court, by its benevolent writ of injunction, shall interfere to prevent said franchise or any part thereof from being assigned, transferred or encumbered to, or in favor of, innocent parties unaffected with notice of his rights.

For as much, therefore, as your orator is remediless save in a Court of Equity where such wrongs are properly cognizable and relieveable, he prays that the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton and Louis Euker be made parties defendant to this bill and required to answer the same, but answer under oath from each and every one of said defendants is hereby expressly waived; that, if it shall be ascertained during the progress of this cause, that the said Shield represented other persons who have not been made parties defendant to this bill, then such other persons, when their names shall be discovered, be also made parties defendant hereto and required to answer this bill, but oath to said answers and to each and every one of them is also expressly waived; that each and all of said parties defendant, their agents and servants, be enjoined and restrained from transferring or encumber-

ing the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said company, or in any other way borrowing money for the use of said company upon its franchise or property; that your orator may (135) be decreed by this honorable court to have valid right and claim to a full one-half interest in and under said contract of August 9th; and, upon the basis of said contract, to have such right and claim to a full one half interest in the said Richmond Traction Company's franchise, enterprise, property and stock; that specific execution of said contract be decreed your orator and enforced under the power and process of the court; that all parties defendant be required and compelled by the process of the court to do and perform every act which may be requisite and necessary to the vesting of your orator's full rights in the premises; and that your orator may have such other, further, general and complete relief as may be agreeable to equity and the nature of his case; and also that a writ of subpoena issue out of and under the seal of this honorable court directed to the said defendants, the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton and Louis Euker, commanding it and them and each of them upon a certain date therein named to be and appear in this honorable court and there to answer all and singular the premises and to abide by and perform such order and decree as may be entered by the court in the cause, but answer under oath from each and all of the said defendants is hereby waived. And your orator, as in duty bound, will ever pray, etc.

(Signed) L. H. HYER.

By STILES & HOLLADAY.

STILES & HOLLADAY,

Solicitors for Complainant.

(136)

EXHIBIT "A" WITH BILL.

An Ordinance to Authorize the Construction and Operation of a Street Railway Within the Limits of the City of Richmond by the Richmond Traction Company.

(This paper is here omitted, because heretofore copied at length in this record. See page 17.)

No one of the defendants to the said original bill has filed or tendered his answer thereto, but said defendants, by their solicitor, on the 31st day of October, 1895, placed among the papers of the cause, in the clerk's office of this court, their written demurrer to the said original bill.

NEW MATTER.

SUBSCRIPTION TO STOCK AND ORGANIZATION OF COMPANY.

And now, by way of amendment and supplement to the said original bill, your orator says that he has been informed, believes and therefore charges that no books for (138) subscription to the capital stock of the said Richmond Traction Company were opened, after proper legal notice and in the mode prescribed by law; that, without such notice and in violation of the laws of Virginia, the said John L. Williams, John Skelton Williams and Ro. Lancaster Williams, comprising a firm and partnership doing business under the name and style of John L. Williams & Sons, John W. Middendorf, Everett Waddey, R. Shereffs, P. B. Sheild, W. F. Jenkins and Charles T. Child, some time in September, 1895, met together, at the banking house of the said John L. Williams & Sons, in the city of Richmond, Virginia, and went through the form of signing their names to a paper purporting to be a subscription list agreeing to take \$300,000 of the capital stock of the said Richmond Traction Company, in the following proportions, viz.: John L. William & Sons, \$280,000; John W. Middendorf, \$5,000; Everett Waddey, \$3,000; R. Shereffs, \$3,000; Phil. B. Sheild, \$3,000; Charles T. Child, \$3,000, and W. F. Jenkins, \$3,000.

Your orator has been informed, and believes and therefore charges that prior to and at the time of the said subscription, each, all and every of the said subscribers for the capital stock of the said company had been put upon inquiry as to the rights of your orator afterwards set out in his original bill, and inquiry by them, or by either of them, would have disclosed to them and to each of them, all the facts afterwards set out in said bill; that, indeed, each, all and every of the aforesaid subscribers had actual notice and knowledge of all your orator's said claims and rights, as afterwards set out in his said original bill, at the time of and prior to their said subscriptions.

And your orator now further and distinctly charges that said subscriptions were made without his knowledge, without notice to him of said meetings, or of said subscriptions; without any opportunity to him to subscribe to the capital stock of said Richmond Traction Company, and

with the design of excluding him from any opportunity to subscribe for any part of the said capital stock, and with the purpose of excluding him from any participation in the stock of said company, or its organization, or the determination of its policy.

Your orator has been further informed, believes and therefore charges that no payment whatever was actually made at the time of subscribing or at any time subsequent thereto, by any or either of the said subscribers, for the capital stock of the said company; that any pretended payment in money or by checks or otherwise made at any time (139) or in any form by said subscribers or by any or either of them, for the said capital stock or any part thereof, or any pretended passing of a consideration of any character to the said Richmond Traction Company, from the said subscribers, or any or either of them, in payment for the said stock or any part thereof, were fictitious and were wrongful and unlawful attempts to evade the laws of this Commonwealth; and your orator has been further informed, believes and therefore charges that since the time of their said subscriptions and without any lawful or valid payment from the said subscribers, or either of them, certificates, purporting to be for fully paid-up stock of the said company, therefore, have been wrongfully and illegally issued to the aforesaid subscribers for the amounts of their respective subscriptions.

Your orator is also further informed, believes and therefore charges that the said so-called subscribers to the stock of the said Richmond Traction Company, on the very day of their said subscriptions, without having made or even pretended to make any payment of any character therefor, and without having complied with the laws of Virginia in respect to the formation and organization of joint stock companies, proceeded to go through the form of electing the following persons as a Board of Directors of the said company, viz.: John Skelton Williams, William M. Habliston, Philip B. Sheild, Everett Waddey, John W. Middendorf, Henry A. Parr and E. B. Addison, and of electing the said John Skelton Williams as president of the said company and William M. Habliston vice-president of the said company, and of authorizing the said pretended Board of Directors to appoint a secretary and treasurer for the said company.

Your orator further charges that all the aforesaid acts and doings of the aforesaid subscribers for the stock of the Richmond Traction Company and alleged stockholders thereof were done and performed with intent to hinder, delay and defraud your orator of and from what

(140) he was and is lawfully entitled to, and were and are null and void under the laws of this Commonwealth. Your orator has been further informed, and believes and therefore charges, that each of the said directors, viz.: John Skelton Williams, William M. Habliston, Philip B. Sheild, Everett Waddey, John W. Middendorf, Henry A. Parr and E. B. Addison, at the time of their election, had been put upon inquiry as to all of the above recited facts and also as to the claims and rights of your orator, as set out in his said original bill, and inquiry by them or either of them would have disclosed to them and to each of them all the said facts and all the said rights and claims of your orator; indeed, that each, all and every of said directors, except the said E. B. Addison, at the time of their said election, had actual notice and knowledge of said facts and of said rights and claims of your orator and of the above recited illegal and wrongful actings and doings of the said subscribers to stock or alleged stockholders, and participated also in their said intent to hinder, delay and defraud your orator in the premises.

Your orator charges that the said election of each, all and every of the said directors was null and void in law; and your orator avers and charges that the said directors, with the exception of the said E. B. Addison, with a full knowledge of all the above recited facts, proceeded, on the day of their own so-called election, to appoint Everett Waddey as secretary and Ro. Lancaster Williams as treasurer of the said corporation, which two said appointments your orator charges to have been illegal and utterly null and void.

AUTHORIZATION AND EXECUTION OF MORTGAGE.

Your orator further says that he has been informed, believes and therefore charges that on the day following the filing of his said original bill in the clerk's office of this court (viz.: on the 31st day of October, 1895), each, (141) all and every of the defendants named therein, and the Maryland Trust Company, a corporation chartered under the laws of the State of Maryland, had actual notice and knowledge of the filing of the said bill, and of each, all and every allegation, statement and charge contained therein; and, in addition to this actual knowledge, that all the said defendants to the original bill, except John W. Middendorf, had constructive notice of the filing of the said bill, its contents and the rights of your orator by the service upon them and each of them by the United States Marshal for the Eastern District of Virginia, in the said district, on the 31st day of October, 1895, of the aforesaid

subpœnas requiring them to answer the said bill; that on the day last named each, all and every of the said defendants (and the said Maryland Trust Company), the individuals acting in person or by their agents, solicitors, counsel or attorneys, and the said Richmond Traction Company and the said Maryland Trust Company, by those acting as their officers, directors, agents, servants, solicitors, counsel and attorneys, read or discussed the said bill and the rights of your orator as therein set out; that the said defendants to the said original bill, including the said John W. Midendorff, by their solicitors, counsel and attorneys, prepared and placed among the papers of this cause in the clerk's office of this honorable court on the 31st day of October, 1895, their written demurrer to the said bill; that, for the purpose of wrongfully and unlawfully depriving your orator of his said rights, they determined to hold on the 1st day of November, 1895, a meeting of such persons claiming to be stockholders of the said Richmond Traction Company, or subscribers as aforesaid for the said capital stock, as could be assembled at the office of Messrs. John L. Williams & Sons, in the city of Richmond, Va., and to have resolutions adopted by such alleged stockholders or persons claiming to be such stockholders, directing the execution of a mortgage, from the said Richmond Traction (142) Company to the said Maryland Trust Company, as trustee, conveying the franchises and all property and assets of the said Richmond Traction Company to secure the payment of five hundred bonds of one thousand dollars each, to be issued by the said last-named company, negotiated and sold by the said Maryland Trust Company and the said John L. Williams & Sons, and the proceeds to be paid over to the said Richmond Traction Company, its so-called officers and directors, and disbursed by them in such manner as to wrongfully and illegally deprive your orator of his just and legal rights in the premises; that certain of the alleged stockholders or persons claiming to be stockholders of the said Richmond Traction Company met at the time and place named, and went through the form of adopting resolutions authorizing the execution of the said trust deed or mortgage, and the issue and sale of bonds of the said Richmond Traction Company and a disposition of the proceeds of the sale thereof, a copy of which resolutions will be found written out upon the face of the trust deed or mortgage, hereinafter filed as an exhibit with this bill, and are prayed to be read and treated as if here inserted in full; but your orator has been informed, believes, and therefore charges, that no regular, proper or legal notice of the time and place of the said meeting was

given; that certain subscribers for the capital stock of the said company, or persons claiming to be stockholders therein, standing upon the same footing with all other stockholders or alleged subscribers to the stock; had no notice or knowledge of the time and place for the said meeting; that the said stockholders' meeting, so pretended or attempted to be held on the 1st day of November, 1895 (as then constituted), had no power to authorize and direct the execution of a mortgage or trust deed upon the franchises and assets of the Richmond Traction Company, or to adopt the aforesaid resolutions; that no person who attended the said stockholders' meeting was in contemplation (143) of law and of the statutes of Virginia, an actual *bona fide* stockholder of the said company, clothed with power or authority to exercise any of the powers or functions of a stockholder in a joint-stock company under the laws of the State of Virginia; that no pretended stockholder who attended the said meeting had paid a dollar, in money, or otherwise, upon his subscription to the capital stock of the said company; that the said meeting was held, or attempted to be held, in violation of the laws of the State of Virginia, and that the said resolutions and all proceedings had, or attempted to be had, at said meeting were therefore null and void; that even if all persons who had subscribed for the capital stock had been present at, or had notice of the said stockholders' meeting, which is denied, no resolutions authorizing the execution of the said trust deed or mortgage could have been lawfully adopted by them, as they were not lawful stockholders, and had no lawful powers and no actual rights, and were all wrongdoers, attempting to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to, and for this reason, also, your orator charges that the said resolutions were and are null and void. Your orator has also been informed, believes and charges that the said stockholders, and each of them, who attended said meeting of November 1st, 1895, had before them at that time a copy of your orator's said bill, filed on the 30th day of October, 1895, or data and memorandum of its contents, or had previously read and discussed the said bill; that each, all and every of the said stockholders, prior to and at the time of the said meeting, had actual notice or knowledge of the several allegations, statements and charges contained in the said bill, and of the rights of your orator in the premises, and that said resolutions were adopted, or attempted to be adopted, with intent to hinder, delay and defraud your orator of and from what he is and was lawfully entitled to, and that the said resolutions and all proceedings

(144) had thereunder are, for this reason, also, wholly null and void.

In view of these facts your orator is advised and charges that each and every of the said stockholders who participated in said meeting, either in person or by proxy, made himself personally, jointly and severally liable to your orator for all loss and damage that may result to him from the adoption of the aforesaid resolutions and the proceedings had thereunder or connected therewith; and while your orator has not been able to ascertain fully who was present at the said alleged stockholders' meeting of November 1st, 1895, he has been informed, believes, and therefore charges, that the following subscribers for the said stock were present, and participated in the said so-called stockholders' meeting, viz.: John W. Middendorf, John L. Williams & Sons, John L. Williams, John Skelton Williams, Ro. Lancaster Williams, Everett Waddey and P. B. Sheild.

Your orator further sheweth unto your honors that he has been informed, believes, and therefore charges, that immediately after the adoption of the aforesaid resolution, on the first day of November, 1895, by the so-called stockholders' meeting of the Richmond Traction Company the so-called directors of said company, on the same day and at the same place, attempted to hold a director's meeting; that said meeting was held in violation of the laws of the State of Virginia and in violation of the by-laws of said company; that, at the said meeting, the so-called directors in attendance went through the form of adopting resolutions authorizing and directing the execution of the aforesaid mortgage or trust deed, the negotiation and sale of the bonds secured thereby, and the disposition of the proceeds of the sale of said bonds; a copy of which resolutions will be found embodied in the trust deed or mortgage, hereinafter filed as an exhibit with this bill, and are now prayed to be read and treated as if here inserted in full; that said resolutions so adopted, or attempted to be (145) adopted, and all the proceedings of the said so-called directors' meeting of November 1st, 1895, were wholly illegal, null and void, and were had and adopted without lawful authority, by individuals having no power or authority to act as a board of directors for the said Richmond Traction Company, and that said resolutions were made and adopted with intent to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to, and are on this account also wholly illegal, null and void.

And, while your orator has been unable to ascertain

whether all the aforesaid alleged directors of the said Richmond Traction Company attended said so-called meeting of said so-called board of directors of said company, held November 1st, 1895, your orator has been informed, believes, and charges that the said John W. Middendorf, John Skelton Williams and Wm. M. Habliston did attend said so-called meeting, and your orator is advised, and therefore charges, that said meeting was not a legal and valid meeting of the board of directors of the said company, and that the individuals who attended and took part in said meeting thereby made themselves personally, jointly and severally liable to your orator for all loss and damage which have accrued or may hereafter accrue to to him from the action of the aforesaid meetings of November 1st, 1895.

Your orator is yet further advised, and charges that such of the so-called directors as absented themselves from said so-called meeting of the board of directors of the said company, held on the first day of November, 1895, with the exception of the said E. B. Addison, did so with full knowledge of your orator's rights in the premises, and of the intent and purpose of the said meeting to hinder, delay and defraud your orator of his said rights, and so absented themselves for the purpose of enabling those in attendance to adopt the aforesaid resolutions, which were adopted; and, therefore, your orator further charges that (146) the said so-called directors who so absented themselves from said meeting of November 1, 1895, also made themselves, personally, jointly and severally liable to your orator for all loss and damage which have accrued, or may hereafter accrue to him from the action of the so-called meeting.

Your orator is not informed that the said E. B. Addison took part in the said meeting and proceedings of the so-called Board of Directors of the Richmond Traction Company, of which he has been, and, as your orator believes, still is formally a member. Indeed, your orator's information leads him to believe that the said Addison did not take such part, and was not informed of the intent of the other directors, and did not attend or participate in said so-called directors' meeting of November 1st, 1895, and, as at present advised, your orator does not include, or intend to include, the said Addison in his aforesaid charges of wrongful and unlawful conduct on the part of the said directors of the said company; but, if hereafter advised or informed that the said Addison did attend and participate in the action of the said meeting of November 1st, 1895, or otherwise participate in the proceedings of

the said so-called board of directors of said company, your orator will ask leave to amend his bill so as to pray for personal relief against said E. B. Addison also.

Your orator further sheweth that, following the adoption of the two aforesaid resolutions, the said Richmond Traction Company, acting by John Skelton Williams, as president, executed to the said Maryland Trust Company, as trustee, a trust deed or mortgage (being the mortgage authorized, contemplated and directed by the said resolutions) bearing date the 1st day of November, 1895, acknowledged by the said John Skelton Williams, as president, on the 4th day of November, 1895, signed also by the said Maryland Trust Company, and by it acknowledged on the said 4th day of November, 1895, and recorded on the last-named day in the Clerk's Office of the Chancery Court of (147) the city of Richmond, which said mortgage or deed of trust purports to be executed by authority of the aforesaid resolutions, which are copied at large upon the face thereof, and conveys the franchises of the said Richmond Traction Company, and all of its property and assets, to the said trustee, to secure the payment of the principal and interest of the said five hundred bonds of one thousand dollars each, particularly described in said trust deed or mortgage, a copy of which is herewith filed, marked "Exhibit B," and is prayed to be taken and read as a part of this amended and supplemental bill, as if here set out at full length.

Your orator is further advised and charges that the said mortgage or trust deed from the said Richmond Traction Company to the said Maryland Trust Company, as trustee, was made and executed in plain violation of the provisions of Section 1232 of the Code of Virginia, Edition 1887, which is in the following words and figures, to wit:

"Sec. 1232. Power to borrow money.—No company, unless expressly authorized by its charter, shall borrow money until there shall be paid up and expended or appropriated the whole amount of capital stock subscribed, with the exception only of losses by delinquent or insolvent stockholders. But the president and directors may borrow an amount not exceeding that part of the capital stock which is unsubscribed, and may issue certificates for the money so borrowed, and may make such certificates convertible, within a prescribed time, into stock of the company, at the pleasure of the holder."

The said Richmond Traction Company claims to have been created by an ordinance of the Council of the City of Richmond, approved on the 28th day of August, 1895,

a copy of which was filed with your orator's original bill in this cause, marked "Exhibit A with Bill," which ordinance was passed pursuant to an Act of the General Assembly of Virginia, passed March 20th, 1860, entitled "An act to authorize the Common Council of Richmond (148) to authorize persons to construct railroads in the streets of said city." See Acts of Assembly of Virginia, 1859-'60, Chapter 214. But your orator is advised, and therefore charges, that such last mentioned act is unconstitutional and void so far as it undertakes to delegate to the City Council of the city of Richmond the authority to prescribe and define the powers and duties of the Richmond Traction Company; and your orator is also advised and charges that all the powers attempted to be conferred by the said act, on companies to be formed under it, save and except the power to construct railroads in the streets of said city are void, because they are not embraced or expressed within the title of said act, as required by Sec. 16, Article IV. of the Constitution of Virginia, in force at the time of the passage of the said act, which said section of the Constitution of Virginia is in the following words and figures, to-wit:

"No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revised or amended by reference to its title, but the act revised or section amended shall be re-enacted and published at length."

Your orator therefore charges that the said Richmond Traction Company was not expressly authorized by its charter to borrow money, and that the whole amount of its subscribed capital stock had not been paid up and expended or appropriated, with the exception of losses by delinquent or insolvent stockholders, when the foregoing trust deed or mortgage was executed. On the contrary, your orator avers that the entire capital stock of said company was subscribed for by John L. Williams & Sons and their associates, as herein stated, and that no part of said capital stock has been paid, but the whole amount thereof still remains unpaid. And your orator avers and charges that in (149) such circumstances the said Richmond Traction Company was prohibited by law from borrowing money or executing any deed of trust or mortgage to secure the same.

Your orator has been informed, believes, and, therefore, charges, that said trust deed or mortgage was made and executed without lawful authority, and that the same should, therefore, be declared null and void by this honorable court; that the object and purpose of the said deed,

of the sale of the bonds thereby secured, and of the disposition of the proceeds of sale thereunder directed, were to deprive your orator of his just and legal rights as set out in his original bill; that said trust deed or mortgage was made and executed with intent to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to receive; and that the said Maryland Trust Company had notice and knowledge of each, all and every of the facts hereinbefore set out, and especially of the fraudulent character of the said trust deed or mortgage, and of the aforesaid resolutions, and of the fraudulent intent with which each and every of them was adopted, made and executed, and that the said trust deed or mortgage should, for these reasons, also be declared null and void, and wholly annulled and set aside.

As bearing on the unlawful intent and character of the said deed, your orator now calls attention to the following marked features thereof, to-wit: that the aforesaid resolutions adopted by the so-called stockholders of the said Richmond Traction Company at their said meeting (150) held on the first day of November, 1895, purporting to authorize the execution of the said trust deed to the Maryland Trust Company (a copy of which resolutions may be found on the face of the said deed), required that each of the bonds secured thereby should contain a provision in the following words, viz:

"The holder of this bond agrees that no recourse shall be had for its payment to the individual responsibility of any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred by or imposed on him by virtue of any law or statute which may now or hereafter be in force."

And, not content with the aforesaid attempted exemption from personal liability (by the resolutions of the said so-called stockholders and the clause required by them to be inserted in the said bonds), the said so-called board of directors, at their meeting held on the first day of November, 1895, in the resolution adopted by such of them as were present on that occasion purporting to authorize the execution of the said mortgage of trust deed to the said Maryland Trust Company, required the insertion therein of a provision in the following words, which may also be found on the face of said instrument, viz:

ARTICLE XI.

"No holder of any of the bonds or coupons hereby

secured shall have recourse for the payment thereof to the individual responsibility of any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred or imposed on him by virtue of any law or statute which may now or hereafter be in force."

But, while the aforesaid provisions contained in the said resolution and mortgage, attempting to exempt themselves from personal liability, serve to illustrate the intent (151) of the aforesaid so-called stockholders and directors in respect to their actings and doings in the premises, and their fear of personal responsibility therefor, yet your orator is advised and charges that these provisions are contrary to public policy, and for this reason, as well as for all other reasons hereinbefore recited, the said bonds and trust deed or mortgage are null and void in law. Let it be understood, however, that in making this charge, based upon the special features just mentioned, your orator does not intend in any way to yield his contention that the said trust deed or mortgage is fraudulent and void throughout. On the contrary, your orator again charges that the said trust deed or mortgage, in all of its parts and provisions, is fraudulent in law and in fact, and that the grantee in the said trust deed or mortgage had notice of the fraudulent intent of its immediate grantor, and that, therefore, the said trust deed or mortgage should be annulled and set aside.

Your orator is further advised and charges that whatever may be said by or in behalf of any of the defendants, except the said E. B. Addison, as to the absence of any particular one or more of the said stockholders or directors of the said Richmond Traction Company from said meetings of November 1st, 1895, and whatever ingenious contention may be set up as to the consequent freedom from personal liability of any such absent stockholder or director for the action had and taken at said meetings or either of them, and especially for the resolutions above mentioned adopted at said meetings and the action taken pursuant thereto, there can be no doubt or question as to the liability in the premises of John W. Middendorf, John Skelton Williams, John L. Williams, Ro. Lancaster Williams, Everett Wadley, P. B. Sheild, John L. Williams & Sons and the Maryland Trust Company: not alone because said parties were present or represented at one or both of said meetings, but because they had otherwise the clearest and fullest notice of your orator's rights and claims in the premises; because some of them publicly denied, scouted, and ridiculed said rights and claims and

(152) declared that they would pay no attention to the assertion of them, because all of them were specially active and influential in carrying out the scheme and plan by which your orator has been thus far cut off from any and all realization of his said rights; because the said John L. Williams & Sons and the Maryland Trust Company managed and engineered this entire scheme, and because the Maryland Trust Company, the trustee in said mortgage or deed of trust, was not only to the fullest extent informed as to the rights and claims of your orator in the premises; but, being so informed, thereafter advised, aided and abetted the determination and action of the said so-called stockholders' and directors' meetings and the adoption of each and all of the aforesaid resolutions, and sought and obtained the position and emoluments of trustee in the mortgage or trust deed of the Richmond Traction Company, prepared and executed pursuant to said resolutions. On these and other grounds your orator is advised and charges that all said last mentioned parties *i. e.*—all mentioned in this paragraph, except E. B. Addison, and especially said Maryland Trust Company, should be held to the fullest extent liable to your orator for all loss and damage which have accrued and all that may hereafter accrue to him, from the action of said meetings of Nov. 1st, 1895, the adoption of said resolutions at said meetings, the execution of said mortgage or trust deed, the negotiation of the bonds secured thereby and the disposition of the proceeds of the sale of said bonds.

Your orator is further and finally advised, and therefore charges, that all the so-called stockholders and directors of the Richmond Traction Company who are made defendants to this bill, except the said E. B. Addison, were wrongdoers conspiring together with intent to hinder, delay and defraud your orator of and from what he was and is lawfully entitled to receive, and are therefore, and for the reasons hereinbefore mentioned, personally, jointly and (153) severally liable to your orator as in the paragraph last above set out, and for all loss and damage which has accrued or may hereafter accrue to your orator from the organization of the Richmond Traction Company, the making of contracts in its name and from its debts or liabilities, if any such there be.

Yet, notwithstanding the personal liability of the said parties to him, your orator is advised and charges that he will be exposed to irreparable injury, unless the court interfere by injunction to prevent the further negotiation and sale of the bonds issued by the Richmond Traction Company and the further expenditure of the money re-

ceived for such sale, and the making and execution of contracts in its name and appoint a receiver to take charge of all property and assets of the said company.

For as much, therefore, as your orator is remediless, save in a Court of Equity where such wrongs are properly cognizable and relievable, he prays that the Richmond Traction Company, John W. Middendorf, Henry A. Parr, John L. Williams, John S. Williams, Ro. Lancaster Williams, the three last named both individually and as partners doing business under the name and style of John L. Williams & Sons, Everett Waddey, R. Shereffs, P. B. Sheild, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Louis Euker, E. B. Addison, Charles T. Child, Edmund Pendleton, William M. Habliston and the Maryland Trust Company, be made parties defendant to this bill and required to answer the same, but answer under oath from each, all and every of the said defendants is hereby waived; that the relief sought and prayed for in his original bill heretofore filed in this cause may be granted to your orator, and, to that end, he here again presents and respectfully presses upon the attention and grace of the court the several prayers of his said original bill, and prays that they may be read, treated and granted as if here again fully repeated and written out; that the so-called subscription to the capital stock of the said Richmond Traction Company made as hereinabove set out, may be declared and decreed to be illegal, null and void; that the script or stock certificates issued to the several so-called subscribers to the capital stock of the said company, upon and by virtue of their so-called subscriptions, may be ordered to be delivered up, declared null and void and cancelled; that the organization of the said Richmond Traction Company and the election of its so-called officers and board of directors, (154) upon the basis of the so-called subscriptions and stock, may be declared and decreed to be illegal and null and void, and that the same may be vacated by the decree of this Court; that the so-called stockholders' and directors' meetings of the said company, held as above set out on the 1st day of November, 1895, and all the proceedings of the said meetings may be declared to be illegal and invalid, and particularly that the resolutions adopted at the said meetings authorizing and directing the execution of the mortgage or trust deed from the said Richmond Traction Company to the said Maryland Trust Company, as trustee, conveying the franchises, property and assets of said company to secure the bonds to be issued by it, and directing the negotiation and sale of said bonds and disposition of the proceeds of such sale, which resolutions are

written out upon the face of said mortgage or deed of trust, may be declared to be illegal, invalid, null and void, that for all the reasons recited in this bill, the said mortgage or trust deed may be declared to be illegal, null and void and be set aside by decree of this court; that all the bonds so secured by said mortgage or trust deed which have been negotiated and sold may be called in, and that these and all other bonds executed or issued pursuant to the resolutions aforesaid may be decreed to be delivered up and cancelled; that all the so-called stockholders and directors of the said Richmond Traction Company, except the said E. B. Addison, and particularly such of them as attended the said stockholders' and directors' meetings of November 1, 1895, which passed and adopted the resolutions aforesaid, may be declared and decreed to be wrong-doers conspiring together with intent to hinder, delay and defraud your orator of his just rights in the premises, and may be held and decreed to be personally, jointly and severally liable to your orator for all loss and damage which have accrued, or may hereafter accrue to him in consequence of the action of the said meetings of November 1st, 1895, the adoption of said resolutions (155) at said meetings, the execution of said mortgage or trust deed, the negotiation of the funds secured thereby and the disposition of the proceeds of the sale of said bonds; that all the defendants may be required and decreed to do, perform and pay whatever may be necessary, to discharge the said Richmond Traction Company and franchise from the consequences of the organization of the said company, and from all contracts, debts and liabilities contracted in the name of the said company, and in all respects to discharge and exonerate the said company and franchise from the payment of all of its debts, liabilities and contracts of every character whatsoever, so far as the same may be prejudicial to the rights of your orator. That the said Maryland Trust Company may be enjoined and restrained from discharging any, all and every of the acts or duties of trustee imposed upon or assumed by it under the said trust deed or mortgage, and especially from authenticating any of the said bonds intended to be secured by the said trust deed or mortgage by the signature of its president to the certificate endorsed on the said bonds, and from delivering the said bonds, or any or either of them, to the said Richmond Traction Company, its president, vice-president, officers or agents, or to any other persons acting for it or in its name, and from selling or otherwise disposing of the said bonds, or either of them, and from paying over any funds in its

hands from the sale or other disposition of the said bonds, or any or either of them, to the said Richmond Traction Company, its officers, directors, agents or others, acting for it or in its name; that the said Richmond Traction Company, its officers, directors, agents, and others acting by or under its authority may be enjoined and restrained from selling or otherwise disposing of the said bonds, or any or either of them, and from paying out or otherwise disposing of the proceeds derived from the sale or other disposition of the said bonds, or any or either of them; that the said Richmond Traction Company, its officers, directors and all others acting or pur-(156) porting to act in its name may be enjoined and restrained from entering into any contract or incurring any debt or liability in the name of the said Richmond Traction Company, or exercising any of the rights, powers, functions or privileges of the Richmond Traction Company; that a receiver may be appointed pending the determination of this cause to take charge of all of the aforesaid bonds, of all the proceeds from the sale of such of them as may have been sold or otherwise disposed of, and of all the property and assets of the said Richmond Traction Company of every character and wherever situated; and that all proper inquiries may be made, accounts taken and decrees entered; and your orator further prays that he may have and be granted such other, further, general and complete relief as may be agreeable to equity and the nature of his case.

Your orator also prays that a writ of subpœna may issue out of and under the seal of this honorable court directed to each, all and every of the persons and corporators hereinbefore prayed to be made parties defendant to this amended and supplemental bill, commanding them and each of them, upon a certain date named therein, to be and appear in this honorable court, and there to answer all and singular the premises and to abide by and perform such order and decree as may be entered by the court in this cause; but answer under oath from each and all of the said defendants is hereby waived.

And your orator, as in duty bound, will ever pray &c.

L. H. HYER.

By STILES & HOLLADAY,

STILES & HOLLADAY,

Solicitors for Complainant.

"EXHIBIT B."

"Exhibit B," with amended and supplemental bill, being a copy of the trust deed or mortgage of November 1, 1895.

(Copy.)

(This paper is here omitted, because heretofore copied at length in this record. See page 45.)

DEMURRER TO SECOND AMENDED AND SUPPLEMENTAL BILL.

(157) Filed May 4th, 1896.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA, AT RICHMOND,
IN EQUITY.

L. H. Hyer

vs.

Richmond Traction Company et als.

The demurrer of the defendants to the second amended and supplemental bill of complaint of the said L. H. Hyer.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in manner and form, as the said L. H. Hyer hath therein set forth and alleged, demur to the said bill, and say that the same is not sufficient in law; and, for causes of demurrer, the said defendants show:

I. That it appears, by the said L. H. Hyer's own showing on the face of his said bill, that under the Constitution and laws of the United States this honorable court, on the equity side thereof, hath no jurisdiction of, and can take no cognizance of, the matters and things in said bill set forth, but that the said matters and things alleged and set forth by the said L. H. Hyer in said bill are, under the Constitution and laws of the United States, within the sole and exclusive jurisdiction of the courts of law which have jurisdiction of the parties and the subject matter, and are competent to afford a plain, adequate and complete relief.

II. That it appears on the face of the said bill that this honorable court hath no jurisdiction of the said bill, (158) because the citizenship of the complainant and the several parties defendant, respectively, as shown by the

said bill, bar the jurisdiction of this honorable court, as declared by the Judiciary act and the acts of Congress, in amendment thereof, in such made and provided.

III. That it appears on the face of the bill that the complainant has a plain, complete and adequate remedy at law, if any he has.

IV. That the contract and agreement set forth in said bill as the sole cause of action of the said complainant is against public policy, and null and void; and no court of equity will enforce the same.

V. That the said bill of complaint is multifarious and defective for misjoinder of the other defendants with the defendant, P. B. Sheild, against whom alone the said L. H. Hyer has any cause of action, according to his own showing.

VII. That the said bill is demurrable upon its face, for the non-joinder as parties thereto of Wm. H. Duchay and the other associates of the said L. H. Hyer, who, according to his own showing, are jointly interested with said Hyer in the alleged cause of action set forth in his said bill.

VII. The plaintiff seeks to set aside the organization of the Richmond Traction Company and deny its powers as a corporation, which can only be accomplished by a writ of *quo warranto* filed in the Circuit Court of Richmond, Virginia, by the Attorney-General of the State.

VIII. The plaintiff claims one-half of the franchise and profits of the Richmond Traction Company, and at the same time prays this court to enjoin the exercise of the said franchise by the said company, and thus seeks to prevent the making of the profits he claims a share in

IX. The plaintiff seeks to have decreed his one-half of the franchise of the Richmond Traction Company, while he shows that he has never subscribed for one-half of its stock, or offered to so subscribe.

(159) X. The second amended bill of the complainant, Hyer, materially changes the very substance of his original bill, and is an attempt to make a new case.

Wherefore, and for divers other good causes of demurrer, appearing on the face of said bill, these defendants demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make any

answer to said bill; and they humbly pray to be hence dismissed, with their costs, in this behalf sustained.

JOHN L. WILLIAMS,
RICHMOND TRACTION COMPANY
AND OTHERS, Defendants, by Counsel.

We hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law, and should be sustained.

W. W. HENRY.
JAMES LYONS,

UNITED STATES OF AMERICA, }
Eastern District of Virginia, } To-wit:

John L. Williams, being duly sworn, *make* oath and say that *they are* defendants in this cause, and that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me this 4th day of May, 1896, in my office at Richmond, Virginia, in said District.

HENRY FLEGENHEIMER,
U. S. Comr. East. District of Va.

OPINION OF THE COURT.

(160)

Filed August 5th, 1896.

This cause has been most elaborately and ably argued on the defendants' demurrer to the complainant's second amended and supplemental bill of complaint. Numerous grounds of demurrer are assigned, but considering them in the order in which they appear, it will only be necessary, in the view I take of this case, to dispose of the four first mentioned.

The first and second are in substance the same, in which the claim is made that this court has not jurisdiction in this controversy on account of the citizenship of the parties therein, and because of the provisions of the Constitution and laws of the United States relating to such matters. The claim is, in my judgment, without merit. I find that the court has jurisdiction of this controversy and of the parties; in fact, counsel for the defendants, in closing the arguments on the demurrer, virtually conceded the jurisdiction of the court, so far, at least, as the question of citizenship was concerned.

The third reason assigned is that the complainant has a plain, complete and adequate remedy at law, if any he has, against the defendants in the case made by the bills. I not concur with counsel for the defendants in the argu-

ment submitted on this point, and, so far as it is concerned, the demurrer must be overruled. In my judgment, in cases of this character, where specific performance is claimed, complete and adequate remedy can only be had in a court of equity.

The fourth reason assigned for the demurrer is that the contract and agreement set forth by the complainant as cause of action is null and void, because against public policy, and that, therefore, a court of equity should not enforce it. Counsel for complainant and defendants, with zeal highly commendable, have most successfully searched the books, and presented to the court all the authorities, I think, bearing upon this point from the earliest reports to the present time. I have carefully examined them, giving to the same much time and thought. While none of the cases cited are exactly similar to one I now consider, still many of them have points in common with it, and the reasoning of the courts in the able opinions referred to, by which the rule of law mentioned has now been well established, includes, in my judgment, contracts of the character set up and relied upon by the complainant. I think that the contract, the specific enforcement of which is the object of this suit, the intention of which was to withdraw competition from before the City Council of the city of Richmond, is void, because against public policy, and I shall, therefore, decline to enforce the same. Reaching this conclusion, it will be unnecessary to consider the remaining grounds of demurrer. A decree may be prepared *detaining* defendant's demurrer and dismissing complainant's bills.

My continued engagements on the circuit since this case was submitted, and the time necessarily required to examine the many authorities cited, have prevented the preparation and filing of an opinion covering the points decided, and I would delay the announcement of my conclusion in order that I might have time so to do were not for reasons plainly apparent the parties hereto, in which counsel evidently concur, most anxious for an early decision of the question raised by the demurrer. This case involves questions of great importance, not only to the complainant, but to the country at large, and its early decision by the court of last resort is desirable, not only because of the interests of the parties to the controversy, but also because the public is concerned in the early and proper adjustment of same. An appeal to the Circuit Court of Appeals for this circuit, if now promptly taken and perfected, can be heard and disposed of at the coming November term of that court.

NATHAN GOFF,
U. S. Circuit Judge.

August 5th, 1896.

(161) And at another day, to-wit: at a Circuit Court of the United States for the Eastern District of Virginia, held at Richmond, in said district, on the 22nd day of August, 1896, the following order was entered, to-wit:

ORDER OF COURT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

L. H. Hyer, Plaintiff,	}
<i>vs.</i>	
Richmond Traction Company et als.,	
Defendants.	}

It is adjudged and ordered that the decree entered in this cause on the 6th day of April, 1896, actually amended the original bill filed in this cause, with amendments thereto made in pursuance of decrees in this cause entered prior to that day, and also the amended and supplemental bill filed in this cause in pursuance of the decree entered herein on the 1st day of February, 1896, as particularly set out and prayed in the petition of the complainant, L. H. Hyer, filed by said decree of April 6th, 1896, and that said original bill, with amendments thereto, and said amended and supplemental bill, stood actually amended from and after the 6th day of April, 1896, as above stated. But the complainant, for the sake of clearness, filed in the clerk's office of this court, at Richmond, Virginia, on the 18th day of April, 1896, a complete draft of the original bill in this cause as amended and as the same reads with all amendments allowed by this court up to the 18th day of April, 1896, and also a complete draft of the amended and supplemental bill filed in this cause by the complainant as amended and as the same reads with all amendments allowed by this court up to the 18th day of April, 1896, and said two bills so filed on the 18th day of April, 1896, were used and referred to by the court and counsel upon the argument hereafter mentioned, and copies of the same were delivered by the complainant to the defendants at the time the same were filed; and the defendants, on the 4th day of May, 1896, filed at the rules in the clerk's office of this court, at Richmond, Virginia, their demurrer to the amended and supplemental bill of the complainant as said bill was amended by the decree entered in this cause on the 6th day of April, 1896, and to said amended and supplemental bill, filed by the complainant, as aforesaid, on the 18th day of April, 1896, and this court, upon mo-

tion of the complainant in open court, set down said demurrer filed on the 4th day of May, 1896, for argument thereon, which argument was had before this court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 15th days of May, 1896; and it now appearing that by inadvertence no decrees filing said two amended bills last above mentioned—that is to say, said bills filed April 18th, 1896, and setting down for argument the demurrer of the defendants filed on the 4th day of May, 1886, were signed and spread upon the order book of this court;

It is now adjudged and decreed *nunc pro tunc* that the said two amended bills of the complainant, filed as aforesaid in the clerk's office of this court, at Richmond, Virginia, on the 18th day of April, 1896, shall stand and be treated as filed in this court on the day last named by leave of court granted in the aforesaid decree of April 6th, 1896; and that the demurrer of the defendants filed at the rules on the 4th day of May, 1896, shall be treated as filed on that day; and that on motion of the complainant, L. H. Hyer, the demurrer filed by the defendants on the 4th day of May, 1896, was, on the 5th day of May, 1896, set down for argument before this court.

NATHAN GOFF,
U. S. Circuit Judge.

August 22d, 1896.

(162) And now at this day, to-wit: At a Circuit Court of the United States, in and for the Eastern District of Virginia, held at Richmond, in said district, on the 22nd day of August, 1896, the following order was duly entered of record in the above named cause, viz.:

FINAL DECREE.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA.

L. H. Hyer, Plaintiff,	} In Equity.
<i>vs.</i>	
Richmond Traction Company et als.,	
Defendants.	

This cause having been argued before this court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 15th days of May, 1896, upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is to say, the amended and supplemental bill as amended by the decree herein of April 6th, 1896, and in the form filed

on the 18th day of April, 1896), the court filed its opinion on the 5th day of August, 1896, hereby made a part of the record, holding that the first, second and third grounds of demurrer assigned by the defendant in their said demurrer are not well taken and must be overruled; that the fourth ground of demurrer assigned in the said demurrer is well taken and must be sustained, and that having reached the conclusion last stated, the six remaining grounds of demurrer assigned by the defendants would not be considered. Thereupon it is adjudged and decreed:

First. That the first, second and third grounds of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, to the second amended and supplemental bill filed by the complainant, be and the same are hereby overruled.

Second. That the fourth ground of demurrer assigned by the defendants in said demurrer filed May 4th, 1896, be and the same is hereby sustained, and all bills filed by the complainant are, for this reason, hereby dismissed, with costs to the defendant, to be taxed by the clerk; and the remaining six grounds of demurrer assigned by the defendants are not considered or determined by the court.

NATHAN GOFF,
U. S. Circuit Judge.

August 22d, 1896.

PETITION FOR APPEAL.

(163) Filed October 6th, 1896,

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA. IN THE
FOURTH JUDICIAL CIRCUIT.

L. H. Hyer, Plaintiff,	} In Equity.
<i>vs.</i>	
Richmond Traction Company and others, Defendants.	

To the Honorable Judges of the Circuit Court of the
United States for the Eastern District of Virginia:

Your petitioner, L. H. Hyer, respectfully represents as follows:

1. That your petitioner is the complainant in this suit; that the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Wad-

dey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton and Louis Euker were made defendants to the original bill filed herein; and that the same defendants and the Maryland Trust Company, a corporation, Ro. Lancaster Williams, William M. Habliston, Henry A. Parr and E. B. Addison were made defendants in the amended and supplemental bill filed herein by your petitioner.

2. Your petitioner, conceiving himself aggrieved by the decree made and entered in the said above entitled cause on the 22nd day of August, 1896, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and your petitioner prays that this appeal may be allowed; that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit, and that said decree of August 22nd, 1896, may be reviewed and reversed by the said United States Circuit Court of Appeals.

And your petitioner prays for such further and general relief as may be proper in matters of this character; and your petitioner will ever pray, &c.

L. H. HYER.
by STILES & HOLLADAY.

STILES & HOLLADAY,
Solicitors for Petitioner, L. H. Hyer.

ASSIGNMENT OF ERRORS.

(164) Filed October 6th, 1896.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF VIRGINIA, IN THE
FOURTH JUDICIAL CIRCUIT.

L. H. Hyer, Plaintiff,	}	In Equity.
<i>vs.</i>		
Richmond Traction Company and others,		
Defendants.		

Assignment of errors filed by L. H. Hyer with his petition for appeal in the above entitled cause from the decree rendered in said cause on the 22nd day of August, 1896.

And now, on this 6th day of October, 1896, came the petitioner, L. H. Hyer, plaintiff in the above entitled suit, by Stiles & Holladay, his solicitors, and says that the decree entered in the said cause on the 22nd day of August, 1896, dismissing all bills filed by the said L. H. Hyer in the above entitled cause, is erroneous and against the rights of the appellant, L. H. Hyer; and said petitioner, L. H. Hyer, appellant, assigns for error, and will contend, in the Appellate Court, that the court below erred as follows :

1.

First. That the court erred in sustaining the fourth ground of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, and, for the reasons assigned in said fourth ground of demurrer, dismissing all bills filed by the complainant, L. H. Hyer. The said fourth ground of demurrer assigned by the defendants in said demurrer filed May 4th, 1896, is in the following words and figures, to-wit :

(165) The appellant, L. H. Hyer, respectfully submits and will contend in the Appellate Court that the contract and agreement set forth in his bills filed in this cause, and referred to in said demurrer, were and are perfectly valid and lawful in all respects; that said contract and agreement are in no manner contrary to public policy; that the court below erred in holding said contract and agreement to be contrary to public policy, and therefore null and void, and erred in declining to enforce specific performance of the said contract and agreement; and erred in dismissing the bills filed by L. H. Hyer, or either of them.

2.

Second. That the court erred in sustaining the demurrer filed by the defendants, and erred in dismissing all bills filed by the said L. H. Hyer, or either of them. The contract and agreement set out in the bills filed by the said L. H. Hyer state a plain case for relief in a court of equity; the court below should have overruled all demurrers filed by the defendants herein, and each and every ground of demurrer assigned by the defendants in their said demurrers, and should have retained jurisdiction of this suit and granted the relief prayed by the said L. H. Hyer in his said bills.

3

Third. That the court in dismissing the bills filed by the said L. H. Hyer in this cause, or either of them, for the reasons set out in the said decree herein of August 22nd, 1896, and the opinion of the court mentioned herein and made a part of the record; and erred in dismissing the said bills, or either of them, for any reason.

4.

Fourth. For these and other reasons appearing upon the record of said decree of August 22nd, 1896, your petitioner prays for an appeal from and supersedeas to said decree, and that the said decree may be reviewed and reversed.

L. H. HYER,
by STILES & HOLLADAY.

STILES & HOLLADAY,
Solicitors for Petitioner, L. H. Hyer.

ORDER ALLOWING APPEAL.

(166) Entered October 6th, 1896.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
EASTERN DISTRICT OF VIRGINIA.

L. H. Hyer, Plaintiff,	} In Equity.
<i>vs.</i>	
Richmond Traction Company et als.,	
Defendants.	

This day came L. H. Hyer, plaintiff in the above styled cause, wherein the Richmond Traction Company and others are defendants, by Stiles & Holladay, his counsel, and filed his petition in writing, together with a written assignment of errors, praying an appeal from the final decree entered or rendered in the said above styled cause on the 22nd day of August, 1896. And now, on this 6th day of October, 1896, it is ordered and decreed by this court that an appeal be and the same is hereby allowed from the aforesaid final decree of August 22nd, 1896, entered or rendered in the said above styled cause—in accordance with the prayer contained in the aforesaid peti-

tion of the said L. H. Hyer. Bond, as required by law, in the penalty of \$1,000 to be given by said Hyer, or some one, or him, with good security.

NATHAN GOFF,

U. S. Circuit Judge.

BOND ON APPEAL.

(167) Filed and Approved Oct. 6th, 1896.

Know all men by these presents, that we, D. H. Brimmer, as principal, and the Virginia Trust Company, a corporation duly incorporated and organized under the laws of the State of Virginia, as surety, are held and firmly bound unto the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee; A. B. Guigon, Edmund Pendleton, Louis Euker, The Maryland Trust Company, Ro. Lancaster Williams, Wm. M. Habliston, Henry A. Parr, and E. B. Addison, defendants, in the full and just sum of one thousand dollars, to be paid to the said parties above named as defendants, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a Circuit Court of the United States for the Eastern District of Virginia, in a suit depending in said court between L. H. Hyer, as complainant, and the said parties above named as defendants, a decree was rendered against the said complainant, L. H. Hyer, on the 22nd day of August, 1896, the said suit being a suit in equity; and the said L. H. Hyer having obtained an appeal and filed a copy thereof in the Clerk's Office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said parties herein above named as defendants, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the day in the said citation mentioned.

Now, the condition of the above obligation is such that, if the said L. H. Hyer shall prosecute said appeal to effect, and answer all damages and costs, if he fails to make

his plea good, then the above obligation to be void, else to remain in full force and virtue.

D. H. BRIMMER,
By ADDISON L. HOLLADAY, [Seal.]
His Attorney in fact, under power
of attorney herewith filed.
VIRGINIA TRUST COMPANY,
By A. L. HOLLADAY,
Its Attorney in fact, under power
of attorney herewith filed.

Approved—

NATHAN GOFF,
U. S. Circuit Judge.
October 6th, 1896.

STATE OF VIRGINIA, }
City of Richmond. } To-wit:

(168) I, W. W. Gosden, a notary public for the city of Richmond, in the State of Virginia, do hereby certify that Mann S. Quarles, whose name as vice-president of the Virginia Trust Company, and by whom the name of said company is signed to the writing above, bearing date on the 5th day of October, 1896, has this day acknowledged the same before me, in my city aforesaid, as the act and deed of said Virginia Trust Company, and the said Mann S. Quarles also made oath before me that he is the vice-president and chief executive officer of said company, and that the said Virginia Trust Company has a capital and surplus over and above all its liabilities of more than \$500,000.

Given under my hand this 5th day of October, 1896.

W. W. GOSDEN,
Notary Public.

POWER OF ATTORNEY FILED WITH FOREGOING BOND.

(169) Know all men by these presents, that the Virginia Trust Company, a corporation duly incorporated and organized under the laws of the State of Virginia, doth hereby constitute and appoint Addison L. Holladay its true and lawful attorney in fact for the said company, to appear before the United States Circuit Court for the Eastern District of Virginia, or before any Judge of the said court, either in term time or in vacation, and to execute and to acknowledge, for the said Virginia Trust Company, and in

its name as surety, such bond and in such form and penalty as may be required by the aforesaid court, or any judge thereof, upon granting or allowing to L. H. Hyer an appeal or an appeal and supersedeas in the cause of L. H. Hyer, plaintiff, against Richmond Traction Company et als., defendants, from a decree entered in the said cause by the said court on the 22nd day of August, 1896, and from any decree entered by the said court in the said cause; provided, however, that the penalty of the said bond shall not exceed the amount of one thousand dollars: our said attorney being hereby authorized to execute said bond in our name as surety for the said L. H. Hyer, or for such person as may execute such bond as principal for and in place of the said L. H. Hyer. And the said attorney is hereby authorized to affix the corporate seal of this company to such bond.

{ Seal. }

In witness whereof, the said Virginia Trust Company has hereto set its name and hereto affixed its corporate seal, this 5th day of October, 1896.

VIRGINIA TRUST COMPANY,
MANN S. QUARLES,

Vice-President.

Attest:

JNO. MORTON,

Secretary.

POWER OF ATTORNEY FILED WITH FOREGOING BOND.

(170) Know all men by these presents, that I, D. H. Brimmer, of Richmond, Va., do hereby constitute and appoint Addison L. Holladay, of Hanover county, in said State, my true and lawful attorney in fact for me to appear before the United States Circuit Court for the Eastern District of Virginia, or before any judge of the said court, either in term time or in vacation, and to execute and acknowledge for me, and in my name as principal, such bond and in such form and penalty as may be required by the aforesaid court, or any judge thereof, upon granting or allowing to L. H. Hyer an appeal, or appeal and supersedeas, in the cause of L. H. Hyer, complainant, against Richmond Traction Company and others, defendants, from a decree entered in the said cause by the said court, on the 22d day of August, 1896, and from any decree entered by the said court in the said cause; provided, however, that the penalty of the said bond shall not exceed the sum of one thousand dollars.

Given under my hand and seal this, the fifth (5th),
1896.

D. H. BRIMMER, [Seal.]

STATE OF VIRGINIA, }
City of Richmond. } To-wit:

I, Louis J. Heindl, a Notary Public for the City of Richmond, in the State of Virginia, do hereby certify that D. H. Brimmer, whose name is signed to the writing hereto annexed, bearing date on the fifth (5th) day of October, 1896, has acknowledged the same before me, in my city aforesaid.

Given under my hand this, the 5th day of October,
1896.

LOUIS J. HEINDL,
Notary Public.

(171) CITATION.

UNITED STATES OF AMERICA, } ss:

The President of the United States, To the Richmond Traction Company, John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, R. Shereffs, P. B. Sheild, Charles T. Child, W. F. Jenkins, W. F. Jenkins, trustee, A. B. Guigon, Edmund Pendleton, Louis Euker, the Maryland Trust Company, Ro. Lancaster Williams, Wm. M. Habliston, Henry A. Parr and E. B. Addison—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 3d day of November next, pursuant to an appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia in your favor passed in a cause in said court, wherein L. H. Hyer is complainant and you are defendants, to show cause, if any there be, why the decree rendered against the said complainant, L. H. Hyer, in said caused mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, this 6th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

NATHAN GOFF,
Judge U. S. Circuit Court 4th Circuit.

Legal service of the within summons is acknowledged.
October 9, 1896.

THE RICHMOND TRACTION COMPANY,
JOHN L. WILLIAMS,
JOHN S. WILLIAMS,
EVERETT WADDEY,
RO. LANCASTER WILLIAMS,
WM. M. HABLSTON,

By W. W. HENRY,
Their Attorney.

LOUIS EUKER,
R. SHERIFFS, &
A. B. GUIGON,

By PEGRAM & STRINGFELLOW.
CHARLES T. CHILD.
W. F. JENKINS.
W. F. JENKINS, Trustee.
E. B. ADDISON.
EDMUND PENDLETON.
PHIL. B. SHEILD.

Octo. 13th, '96.

(172) Baltimore, October 13th, 1896.

We hereby admit service of the within summons and citation upon us.

JOHN W. MIDDENDORF.
MARYLAND TRUST COMPANY.

By J. BERNARD SCOTT, Secretary.
H. A. PARR.

SHUMAKER & WHITELOCK,

(173) Solicitors for above named parties.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA. }
Eastern District of Virginia, } ss:

L. H. Hyer, Plaintiff,

vs.

Richmond Traction Company } In Equity.
et als., Defendants. }

I, M. F. Pleasants, Clerk of the United States Cir-

cuit Court in and for the Eastern District of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause in the caption named, with the exception of the subpoena, which has been lost from the files, as the same remains on the files of my office.

{ Seal
of the
Court. }

In testimony whereof, I have this day set my hand and affixed the seal of said court, at Richmond, in said district, this 26th day of October, A. D. 1896.

M. F. PLEASANTS, Clerk.



**PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF
APPEALS, FOURTH CIRCUIT.**

No. 198.

L. H. Hyer, Appellant,	}	Appeal from the Circuit Court of the United States for the Eastern District of Virginia, Richmond.
<i>vs.</i>		
Richmond Traction Company		
et al., Appellees.		

October 27, 1896, Transcript of Record filed.

Same day appearance of Stiles and Holladay, Esquires,
for the appellant.

Same day appearance of W. Wirt Henry and George
Whitelock, Esquires, for the appellees.

November 21, 1896, cause continued.

December 24, 1896, 20 copies of the printed record
filed.

February 8, 1897, (February term 1897,) cause came
on to be heard on the transcript of the record, and was ar-
gued by counsel and submitted.

At the May term, 1897, to-wit: May 12, 1897, the
court made and entered the following order:

ORDER FOR ADDITIONAL BRIEFS

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 198.

L. H. Hyer, Appellant,	}	Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.
<i>vs.</i>		
Richmond Traction Company,		
et al., Appellees.		

Per curiam:

Counsel in this case are requested to furnish the court
with briefs directed to the question whether the complain-
ant below has not a plain, adequate and complete remedy
at law, if any he has, with leave to add such additional ob-
servations on the case generally as they may be advised.

Let the brief on the part of appellant be filed and
served on appellee within thirty days from the date hereof,
and let appellee reply within twenty days thereafter, and
let appellant file reply brief within ten days after service
of appellee's brief.

CHARLES H. SIMONTON,

May 12, 1897.

Circuit Judge.

At the same term, to-wit: May 14, 1897, order for additional briefs rescinded, and the court announced and filed its opinion, Judge Brawley dissenting, which is as follows, to-wit:

OPINION.

UNITED STATES CIRCUIT COURT OF APPEALS. FOURTH CIRCUIT.

No. 198.

L. H. Hyer, Appellant,	}	Appeal from the Circuit Court of the United States for the Eastern District of Virginia, and Fourth Judicial Circuit, at Richmond, Virginia.
<i>versus</i>		
Richmond Traction Company	}	
et als., Appellees.		

Before Mr. Chief-Justice FULLER, SIMONSON, Circuit Judge, and BRAWLEY, District Judge.

[Argued February 9, 1897. Decided May 14, 1897.]

ROBERT STILES and A. L. HOLLADAY, for Appellant; W. WIRT HENRY and GEORGE WHITELOCK, for Appellees.

STATEMENT.

This case comes up on appeal from the Circuit Court of the United States for the Eastern District of Virginia.

The cause was heard below upon demurrer to the bill. The bill states, in substance, the following facts:

The complainant is a civil engineer who has been engaged in promoting and constructing street railways in various cities of the United States. His attention was attracted to the city of Richmond as a promising field for his enterprise, and, having secured the assurance of assistance from capitalists, he made application to the City Council of that city for the franchise of a street railway through Broad street. He succeeded in obtaining an ordinance granting him this franchise for a company to be called the Richmond Conduit Railway Company. But the ordinance as it finally passed did not contain certain terms which he had asked for and had deemed essential. He therefore asked amendments and modifications of the ordi-

nance, and received assurances from prominent officials that the desired amendments would be made, provided that a deposit of \$10,000, as a guarantee of good faith, should be made in one of the banks of Richmond. This deposit was, in fact, made by him on 17th July, 1895, and shortly thereafter he went to New York to obtain from the capitalists who were at his back the financial assistance he required.

Whilst he was engaged in these efforts to secure his franchise and to amend the ordinance, he was aware that he had active competition from other parties, who sought the same franchise for the Richmond Traction Company. This competition was led by one P. B. Shield, a lawyer in Richmond. These competitors, however, had no communication with each other prior to the departure of complainant for New York, and, indeed, there was no personal acquaintance between them. The complainant regarded himself as having altogether the inside track, and appeared to himself to be master of the situation. Stewart & Co., of New York, were the capitalists on whose assistance complainant relied. When he left Richmond and went to New York, as above stated, he called at the office of Stewart & Co., to complete his negotiations with them, and found that P. B. Shield was at that moment in private conference with the head of the firm, S. H. G. Stewart. During the day Shield and the complainant separately had interviews with Mr. S. H. G. Stewart, and finally Mr. Stewart, after telling the complainant that Shield's purpose was to get some recognition for the promoters of the Richmond Traction Company at the hands of the promoters of the Richmond Conduit Company, advised complainant to do so. He urged that the rivalry between the Conduit Company and your orator and his associates, on the one hand, and the Traction people and the said P. B. Shield and his associates, on the other hand, and antagonism of this character, would probably result in the defeat of both their schemes, or the passage of the franchise in favor of one of the two competitors loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise, and he, therefore, urged complainant to shake hands with said Shield, to unite forces with him upon one of the two ordinances—the Conduit ordinance or the Traction ordinance—and thus to secure and share the fruits of victory, instead of the disappointment and bitterness of defeat.

The advice of Mr. Stewart was accepted. The late rivals became allies. They met in conference in New York, came to a full understanding, and, as its result, embodied their agreement in a letter to Mr. S. H. G. Stewart:

"New York, August 9th, 1895.

"S. H. G. Stewart, Esq.,

"40 Wall Street, City.

"Dear Sir,—We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Shield, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, in Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER,

"(Signed) PHIL. B. SHEILD."

The bill alleges that Shield was the agent of and acted for all the promoters of the Richmond Traction Company, who were such at the date of this complaint. And that all persons who have come into the enterprise since that date, having received the benefit of the contract, are also bound by it.

This contract having been made, all efforts to perfect the ordinance granting franchises to the Richmond Conduit Company ceased, the ordinance was withdrawn and an ordinance was passed authorizing the construction and operation of a street railway within the limits of the City

Richmond, by the Richmond Traction Company. Shield broke off all relations with the complainant after he had obtained this contract and sold his interest in the enterprise to certain financiers in Richmond. The ordinance granted the franchise to the Richmond Traction Company, composed of John W. Middendorf, John L. Williams, John S. Williams, Everett Waddey, Reuben Shereffs, Philip B. Shield, Charles T. Child and W. F. Jenkins. The ordinance was passed on 26th August, 1895. The complainant on the afternoon of that day caused to be published a notice in the Richmond *State* newspaper of the nature and character of his claim on the franchise of the Traction Company, that is to say, that he was entitled to one-half thereof when it was granted, in consideration of the fact that he had caused the withdrawal of the Richmond Conduit Company's application for franchises in favor of the Traction Company. This notice, either because it was too late or for some other reason, did not affect or stop the action of the Richmond Council. He also gave notice to each of the persons named in the ordinance of his contract with Shield and his claim thereunder. Upon taking this franchise for the Richmond Traction Company, the persons named in the ordinance undertook to form a corporation and issue shares of stock with a capital of \$300,000, with full notice or means of notice of complainant's rights in the premises. That said corporation was not formed in accordance with the laws of Virginia in such case made and provided. That notwithstanding they selected a board of directors, all of whom but one, A. B. Addison, had notice of complainant's rights and claims. And that the directors determined to execute and did, in fact, execute a mortgage to the Maryland Trust Company, of all the franchise and property of said Traction Company, to secure five hundred bonds of one thousand dollars each, but that said mortgage itself is void as not executed by lawful authority or in accord with the laws of Virginia in such case made and provided.

The complainant after filing his original bill craved and obtained leave to file amended and supplemental bills. The prayer of the original bill is as follows:

"That each and all of said parties defendant, their agents and servants, be enjoined and restrained from transferring or encumbering the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said company, or in any other way borrowing money for the use of said company upon its franchise or property; that your orator may be decreed by this Honorable Court

to have valid right and claim to a full one-half interest in and under said contract of August 9th; and, upon the basis of said contract, to have such right and claim to a full one-half interest in the said Richmond Traction Company's franchise, enterprise, property and stock; that specific execution of said contract be decreed your orator and enforced under the power and process of the court; that all parties defendant be required and compelled by the process of the court to do and perform every act which may be requisite and necessary to the vesting of your orator's full rights in the premises."

The amended bill prays that this prayer of the original bill may be read, treated and granted as if again fully repeated, and further prays that the so-called subscription to the capital stock of the Richmond Traction Company be declared illegal, null and void; that the script issued be called in and cancelled; that the organization of the company based thereon be declared illegal, null and void, and vacated. That all transactions at any meetings of the so-called stockholders and directors be declared null and void, especially the authorization, execution and issue of the bonds and the mortgage to the Maryland Trust Company of Baltimore, and that all the bonds be called in and cancelled. That all the stockholders and directors who participated in these matters, except Addison, be declared wrong-doers, conspiring to hinder, delay and defraud complainant, and liable in damages to him for all losses he may suffer in the premises. That they be required to do whatever may be necessary to discharge the Richmond Traction Company and franchise from the consequences of the organization of the said company and from all contracts, debts and liabilities contracted in the name of said company. That the Maryland Trust Company be enjoined from acting as trustee under the mortgage, and from authenticating any of the bonds, or issuing, delivering or selling the same to any one, and from paying over to any one proceeds of sale of any bonds heretofore sold. And "that the said Richmond Traction Company, its officers, directors and all others, acting, or purporting to act, in its name, may be enjoined and restrained from entering into any contract or incurring any debt or liability in the name of the said Richmond Traction Company, or exercising any of the rights, powers, functions or privileges of the Richmond Traction Company; that a receiver may be appointed, pending the determination of this cause, to take charge of all of the aforesaid bonds, of all the proceeds from the sale of such of them as may have been sold or otherwise disposed of, and of all the property and assets

of the said Richmond Traction Company of every character and wherever situated; and that all proper inquiries may be made, accounts taken and decrees entered; and your orator further prays that he may have and be granted such other, further, general and complete relief as may be agreeable to equity and the nature of his case."

The defendants demurred to the bill, setting forth nine grounds of demurrer. The first and third go to the jurisdiction of a court of equity, in that complainant has a plain, adequate and complete remedy at law. The second denies the jurisdiction because of the citizenship of the parties. These three grounds the court below overruled. The fourth ground is as follows:

"IV. That the contract and agreement set forth in said bill as the sole cause of action of said complainant is against public policy and null and void, and no court of equity will enforce the same."

This ground of demurrer the court below sustained, and thereupon dismissed the bill, the remaining six grounds of demurrer assigned by the defendants not being considered or determined by the court. Leave was granted to complainant to appeal, and the cause is here on assignments of error.

The first assignment of error goes to the ruling of the court below, that the contract sued upon is void as contrary to public policy.

The second assignment of error asserts error in the court in not overruling all the grounds of demurrer filed by defendants, and in not granting the relief prayed.

The third and fourth are too general and vague and will not be regarded.

SIMONTOX, Circuit Judge:

The question in this case is: Is the contract set forth in the bill as the sole cause of action such a contract as a court of equity will enforce?

There were two competitors before the Municipal Authorities of Richmond, each seeking for himself, upon the best terms he could, the grant of a street railway franchise. Apparently both of them were promoters, that is to say, were without sufficient capital themselves, depending upon securing the aid, co-operation or purchase of capitalists. The competition evidently was bitter and hostile, for the competitors had no communication whatever with each other. The complainant was satisfied that he had "the inside track" and was "master of the situation." With this high hope and encouragement he sought his capitalist in New York to obtain the fruition of his efforts. There

he unexpectedly meets his rival in close conference with the capitalist. Under the advice of this capitalist he lays aside his rivalry and the competitors become allies, and all competition between them ceases. The reasons which induced him were that the antagonism would probably result in the defeat of both, or that before the franchise was obtained it would be loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise. The result of the advice was the contract in question. By this contract complainant and his rival joined hands, withdrew all competition, agreed to co-operate in securing a franchise for a street railway from the municipal authorities of Richmond and to divide whatever was realized from the enterprise, first deducting expenses incurred by either side. They agreed to use, so far as it went, the advantage of complainant's deposit in a Richmond Bank; and the franchise to be asked for was that of the Richmond Traction Company for the building of an overhead trolley railway or cable system. Adding these words: "among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same."

The effect of this reconciliation of interests was to prevent all competition between the rival promoters, to shut off, as far as they could, all possible competition from others, which might result in the defeat of both, and to avoid the imposition of conditions by the municipal authorities, which the promoters, and especially capitalists, might consider onerous and exacting. The Circuit Court which tried the case was of the opinion that the contract was against public policy.

A text writer (Greenhood) states the rule to be this:

"Any agreement which in its object or nature is calculated to diminish competition for the obtainment of a public or *quasi* public contract to the detriment of the public or those awarding the contract is void." (Greenhood on Public Policy, p. 178, Rule CLXXII.)

In *Pingrey vs. Washburn*, 1 Aiken (Vt.), 264, the court held that an agreement on the part of a corporation to grant to individuals certain privileges in consideration that they will withdraw their opposition to the passage of a legislative act touching the interests of the corporation is void as against public policy and prejudicial to correct and just legislation.

In *Hunter vs. Nolf*, 71 Penn. St., 282, a contract between two candidates for the office of United States Assessor that one should withdraw, and if the other were appointed, they should divide profits, was recognized and

treated as against public policy and void. To the same effect is *Mequire vs. Corvine*, 11 Otto, 108.

In *Smith vs. Applegate*, 3 Zab. (N. J.), 352, a note given to a person in consideration that he withdrew all opposition to the opening of a road was held void for the same reason.

The Supreme Court of Massachusetts in *Gibbs vs. Smith*, 115 Mass., 592, clearly marks the line in an analogous case. "An agreement between two or more persons that one shall bid for all upon property about to be sold at public auction, which they desire to purchase together, either because they intend to hold it together or afterwards to divide it into such parts as they individually wish to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced. But such an agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair price, is against public policy and void."

A citation and examination of the very many cases on this fruitful subject would run this opinion, already too long, into an unreasonable length.

Any effort which stifles competition or prevents fair and reasonable price for property is against public policy; especially is this the case when the property is a public, or *quasi* public, franchise. In the case at bar there were two bidders before the municipal authorities of Richmond for the franchise of a street railway. Naturally and normally that competitor would receive the franchise who made the greatest concession for the public welfare. The competition was active. Its tendency was to promote the public interest. It was withdrawn by the coming together of the parties, who agreed to abandon it for fear that they would neutralize each other, and also for fear that the passage of the franchise in favor of one of the two competitors would be loaded with such onerous and exacting conditions that no capitalist could be induced to put his money in it. In other words, the competition would induce great and extraordinary concessions for the public good; to prevent this it was abandoned. Among themselves they would decide what names to be used in procuring the franchise and the policy to be used in procuring it. That is to say, there being but one contractor in the field, the promoters themselves could, in the absence of competition, decide to whom the contract could be awarded, and could, in some measure, dictate the terms and concessions to be used in procuring the franchise.

"The true inquiry is, Is it the natural tendency of

such an agreement to injuriously influence the public interests? The rule is that agreements which, in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principles of sound public policy, and are void." *Atchison vs. Mullen*, 43 New York, 147.

The conclusion is not unreasonable that the contract was against public policy and void.

But it is contended that, if this be admitted, the complainant is still protected by the doctrine laid down in *Brooks vs. Martin*, 2 Wall., 80, recognized in *Farley vs. Hill*, 150 U. S., 576, and in the dissenting opinion in *Burck vs. Taylor*, 152 U. S., 668; *Armstrong vs. American Exchange Bank*, 133 U. S., 467. The principle decided in these cases is:

"When several persons enter into an illegal contract for their own benefit and the illegal transaction has been consummated and the proceeds of the enterprise have been actually received and carried to the credit of one of such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief." (*McCrary, J.*, in *Cook vs. Sherman*, 20 Fed. Rep., 170. See also *Jackson vs. McLean*, 36 Fed. Rep., 217.) This construction by Judge McCrary is sustained upon examining the case of *McBlair vs. Gibbes*, 17 Howard, 233, which is the leading case on which this principle depends. In that case, and in all the quotations cited to support it, the cause of action was not the illegal transaction, the void act, but a subsequent independent contract which the law raised. The difference is between enforcing illegal contracts and asserting title to money derived from them. *Tenant vs. Elliott*, 1 Bos. & Pull., 3; *Farmer vs. Russell*, *Idem.*, 296; *Thomson vs. Thomson*, 7 Vesey, Jr., 473; all cited and approved in *McBlair vs. Gibbes*, *supra*. Sir William Grant, in the case in 7 Vesey, Jr., clearly states the principle. In that case there had been a sale of the command of an East India ship to the defendant. This was an illegal transaction. In consideration of the sale he had agreed to pay an annuity of £200 to the previous commander, from whom he purchased, so long as he remained in command. Defendant, after remaining in command for some time, retired, and secured the retiring allowance of £3,540. The bill was filed to get a decree enforcing the contract and investing so much of this as would produce £200 per annum. The objection was made that the contract providing for the annuity was illegal, and a court of equity

would not enforce it. The distinguished Master of the Rolls held the contract illegal. He recognized the equity in the fund, if it could be reached by a legal agreement, but there was no claim on the money, except through the medium of an illegal agreement, which, according to the determinations, cannot be supported. "How, then," says he, "are you to get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises."

In the case at bar the entire cause of action is on the agreement, which is void through public policy. The complainant depends altogether upon that agreement, and seeks to set aside everything that has been done and to enforce the specific performance of that agreement. He asks the court "to enforce this illegal contract and requires the aid of the illegal transaction to establish his case."

It follows that the contract under consideration can neither be enforced nor made the basis of any relief in a court of equity. The maxim in *pari delicto* applies. The court will leave the parties to such a contract precisely where it finds them. "Courts cannot be made the handmaids of iniquity." *Bank of the United States vs. Owens*, 2 Peters, 539.

It is urged, however, that the complainant, on the very afternoon of the day on which the City Council gave the franchise, exposed his agreement with Shield in a public print. Assuming that this was seen by the members of Council, it cannot avail him. The wrong complained of is not that he concealed his contract, but that he made the contract; not that he pretended still to seek a franchise, but that he sold himself out, and, doing so, defeated competition, shut the City Council in to but one bidder, deprived the public of that contention among bidders which would protect the public from loss and secure the highest price for the sale of the franchise.

This is not a case in which a court of equity should interfere, and the decree of the Circuit Court should be affirmed, without prejudice, however, to any right which complainant may have to seek relief, if any he be entitled to, in a court of law.

The Chief Justice concurred in the result, on the ground that the remedy of the complainant, if any, was at law.

In this conclusion, also, SIMONSON, J., concurred.

BRAWLEY, District Judge :

I dissent. Hyer and Shield were rival promoters, each seeking from the City Council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise.

Hyer had already obtained a franchise from the Council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they united in an agreement for mutual co-operation and for an equal division of whatever profits were realized. The agreement does not on its face bear any of the *indicia* which mark a dishonest purpose. It does not show, nor can it be reasonably inferred, that any sinister, extraneous or corrupting influences were to be brought to bear upon the City Council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise.

It is not contended, nor can it be assumed, that Hyer or Shield, either or both, had such control or monopoly of the building of street railways that they could by combination put up the price or demand an unusual or unreasonable franchise or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or non-action. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right.

The franchise in question was not a thing that was put up at public auction and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The City Council of Richmond, faithful, as it must be assumed, to

its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an object which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and to hold a contract void because its tendency may be to defeat competition it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfilment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint co-operation, and they voluntarily combine in furtherance of the enterprise, there can be no objection to it if it is done honestly and in good faith. Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish the desired end, it should be sustained. "If there is one thing," says Sir George Jessel in a recent case, "which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

All presumptions are in favor of the legality of contracts—all reasonable intendments are indulged to support them—if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion can be drawn from them, for intention to violate the law is not to be presumed.

The extent to which the doctrine of invalidating contracts of this nature may be safely carried is not clearly defined and there is no immutable standard by which this rule is to be tested. Within it are clearly embraced all cases of fraudulent acts and all combinations having for their object the stifling of fair competition at biddings with the design to become purchasers at a price less than the fair value of the property, but combinations for mutual

convenience with a view to enable parties to do in common what neither could do individually and which do not disclose a dishonest purpose are as clearly not within the rule.

Courts must determine each case according to its peculiar facts and circumstances and can only determine rightly when those circumstances are considered in their relation to the reason and grounds of the rule.

In *Atcheson vs. Mallon*, 43 N. Y., 147, the case cited in support of the adverse view, Justice Folger says: "But a joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility and of the joint ability to do the service. The public agents know then all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid."

That Hyer and Shield had made this agreement was no secret. The fact was published in the newspapers in Richmond on the afternoon before the City Council passed the ordinance granting the franchise, and we have no complaint from that city, from the party supposed to be injuriously affected, that the suppression of competition has induced the granting of a franchise not duly regardful of the public interests. The bill states that it was Hyer's intention to lay the whole matter of this agreement before the City Council, and there is no ground for the suspicion that there was any concealment. I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp vs. Taylor* and approved in *McBlair vs. Gibbes* and *Brooks vs. Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the franchise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the court is not sought to enforce it nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed, one of the parties is in possession of all the fruits and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits.

Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter on the ground that it was obtained by any

corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract of his own seeking on the ground that it was immoral, and, therefore, that he has the right to make off with the swag.

Those who have legitimately invested their brains and capital in this enterprise of public utility should not be harassed by the injunctions and other processes which would impede its successful consummation, but the plaintiff is, in my opinion, entitled to an accounting and to a share of the profits realized by his co-promoter, and the bill limited in its scope to that object should be retained.

At the same term, to-wit: May 14, 1897, the court here made and entered the following decree, to-wit:

DECREE

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 198.

L. H. Hyer, Appellant,	}	Appeal from the Circuit Court of the United States for the Eastern District of Virginia.
<i>vs.</i>		
Richmond Traction Company et al., Appellees.	}	

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause, be, and the same is hereby, affirmed, without prejudice, with costs.

It is further ordered that the mandate of the court issue after the expiration of twenty days from the date hereof.

CHARLES H. SIMONTON,
Circuit Judge.

May 14, 1897.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA. }

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

{	Seal	}	In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond this 21 day of May, A. D., 1897.
{	of the	}	
{	Court	}	

HENRY T. MELONEY,
Clerk U. S. Cir. Ct. Appeals, Fourth Circuit.

147 UNITED STATES OF AMERICA, ss.:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which L. H. Hyer is appellant and The Richmond Traction Company *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the eastern district of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court

of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

149 [Endorsed:] Supreme Court of the United States. No. 813. October term, 1896. L. H. Hyer *vs.* The Richmond Traction Company *et al.* Writ of certiorari. The execution of the within writ appears by the schedules hereunto annexed. H. T. Meloney, cl'k U. S. ct. et. appeals, 4th circuit.

150-165 In the United States Circuit Court of Appeals for the Fourth Circuit.

L. H. HYER, Appellant.

vs.

RICHMOND TRACTION COMPANY *et al.*, Appellees. }

Stipulation.

It is hereby stipulated by and between the attorneys of record for the respective parties in the above-entitled cause that the certified transcript of the record of said cause, filed in the clerk's office of the Supreme Court of the United States on the 22nd day of May, 1897, with the petition of the appellant for a writ of certiorari, after the correction of the last paragraph of the dissenting opinion of Judge Brawley, as shewn in the certified copy of the corrected opinion hereto annexed, which correction the clerk of the said Supreme Court is hereby authorized to make in the said certified transcript,

shall be received and considered as the transcript of the record on the return to the writ of certiorari granted by the said Supreme Court on the 25th day of May, 1897.

(Signed)

STILES & HOLLADAY,

Attorneys for the Appellant.

(Signed)

HENRY & WILLIAMS,

Attorneys for the Appellees.

May 28, 1897.

I do certify that the foregoing is a true copy of the original stipulation filed and now remaining of record in the above-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals on this 28th day of May, A. D. 1897.

Seal United States Circuit Court of Appeals, Fourth Circuit.

HENRY T. MELONEY,

Clerk U. S. Cir. Ct. Appeals.

(Here followed certified copy of dissenting opinion, which is omitted in printing here, as it already appears at page 142 of this Record.)

166 UNITED STATES OF AMERICA :

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do make return of the annexed writ of certiorari, issued out of the Supreme Court of the United States in the cause therein entitled, on the 25th day of May, 1897, by annexing hereto a certified copy of the stipulation of the attorneys of record that the certified transcript of the record of said cause, filed in the clerk's office of the Supreme Court with the petition for the said writ of certiorari, shall be received and considered as the transcript of the record on the return to the said writ of certiorari.

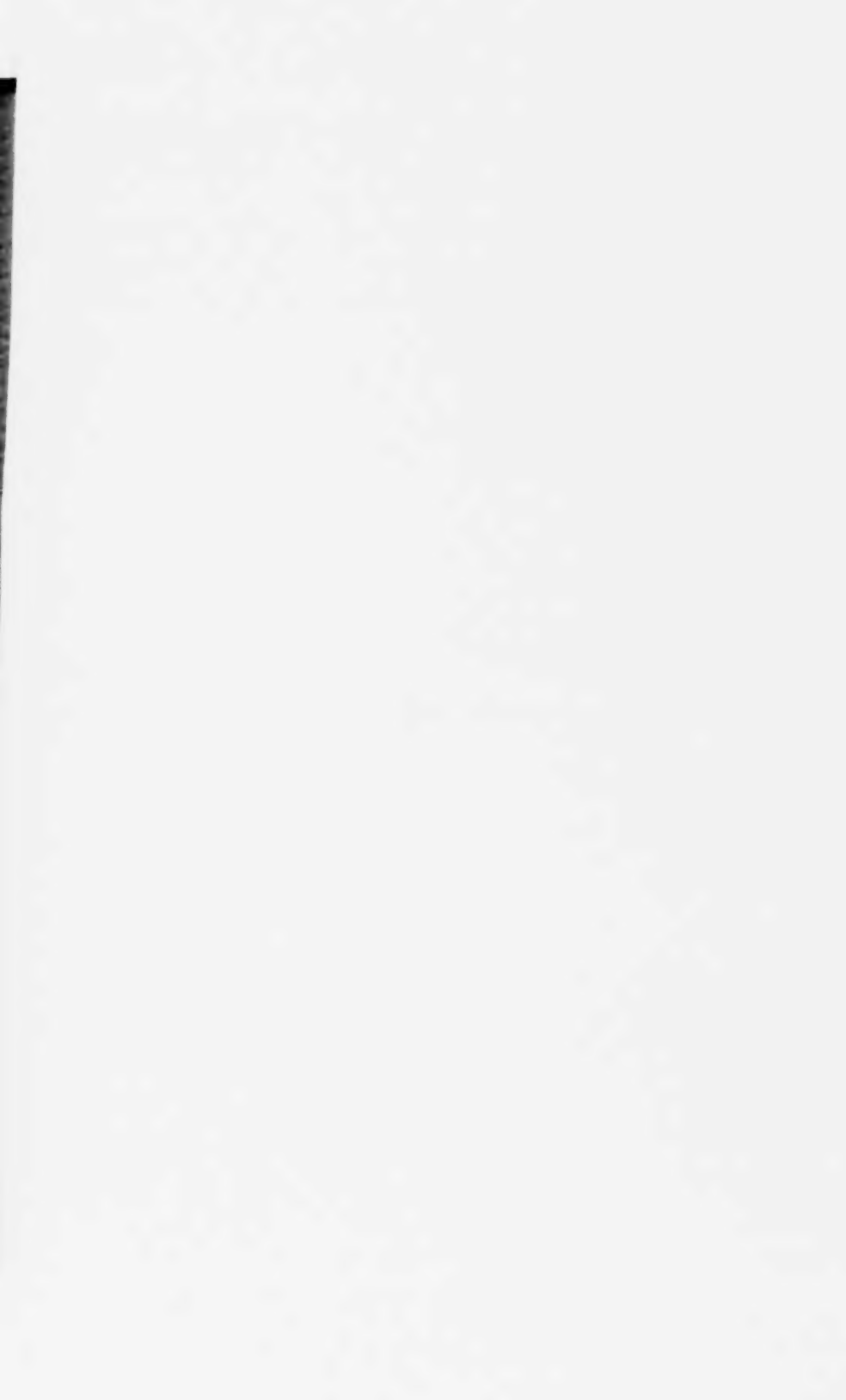
In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals on this 28th day of May, A. D. 1897.

Seal United States Circuit Court of Appeals, Fourth Circuit.

HENRY T. MELONEY,

Clerk U. S. Cir. Court of Appeals, Fourth Circuit.

167 [Endorsed:] Case No. 16,592. Supreme Court U. S., October term, 1897. Term No., 379. L. H. Hyer, petitioner, vs. Richmond Traction Co. et al. Writ of certiorari and return. Filed June 15, 1897.



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844

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

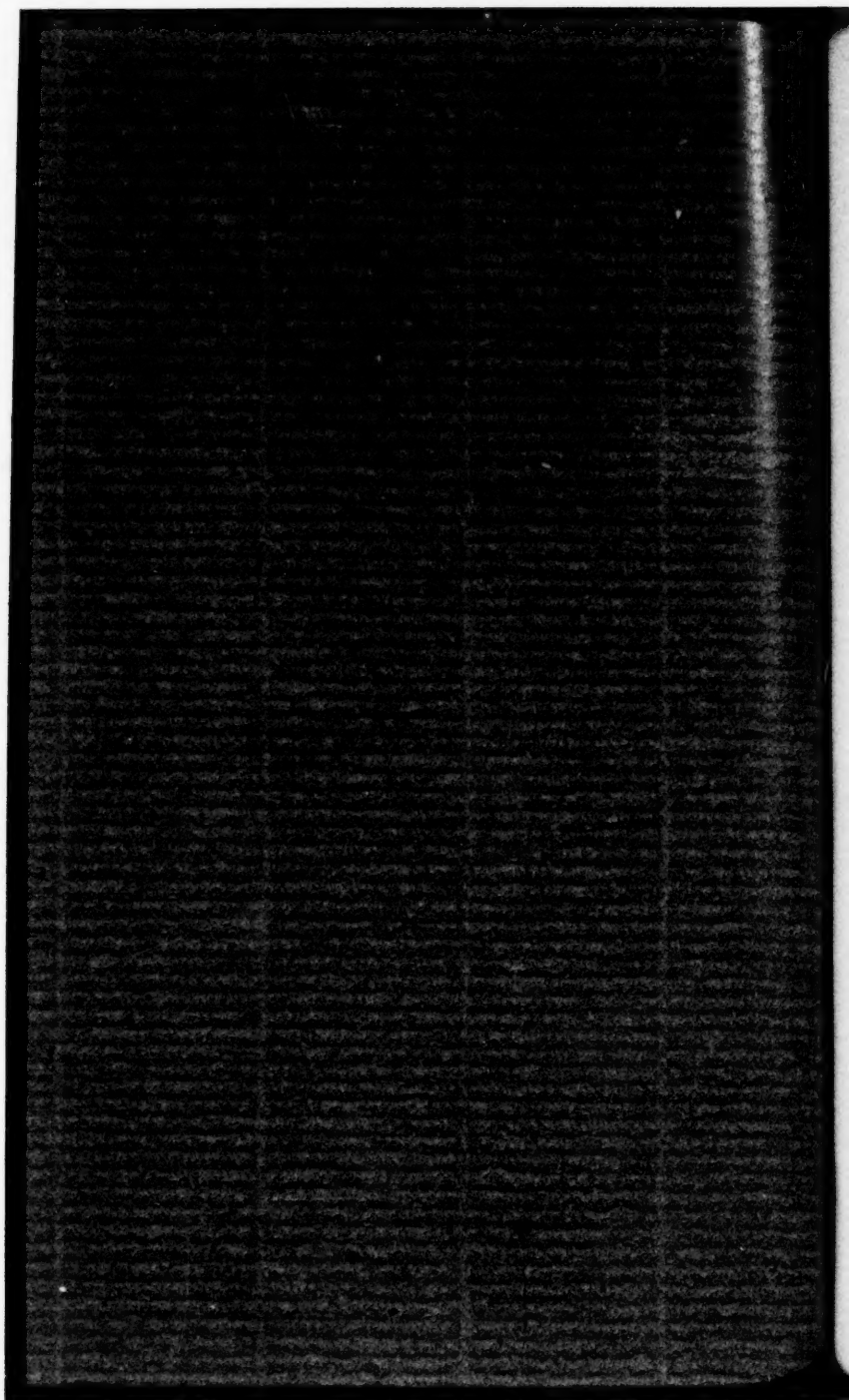
L. H. HYER, APPELLANT.

VS.

RICHMOND TRACTION COMPANY ET AL.,
APPEELES.

PETITION OF APPELLANTS FOR WRIT OF CERTIORARI TO
U. S. CIRCUIT COURT OF APPEALS FOR
THE FOURTH CIRCUIT.

ROBERT STILES,
ADDISON L. HOLLADAY, | Solicitors.



In the Supreme Court of the United States.

OCTOBER TERM, 1896.

L. H. HYER, APPELLANT,

versus

RICHMOND TRACTION COMPANY ET AL.,
APPELLEES.

PETITION OF L. H. HYER FOR A WRIT OF CERTIORARI RE-
QUIRING THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH JUDICIAL CIRCUIT TO CERTIFY TO THE SU-
PREME COURT FOR ITS REVIEW AND DETERMINATION,
THE CASE OF L. H. HYER, APPELLANT, VERSUS
RICHMOND TRACTION COMPANY ET AL., APPELLEES.

To the Honorable, the Supreme Court of the United States :

The petition of L. H. Hyer respectfully shows to this honorable court, as follows :

1. Your petitioner, a citizen of the State of Missouri, by profession a civil engineer, in the early summer of 1895 secured from the City Council of the City of Richmond, Virginia, the grant to himself and associates, under the name and style of the Richmond Conduit Railway Company, of a franchise to build a street railway on Broad and connecting streets in said city.

2. This franchise, as finally passed, not being in all respects what your petitioner had asked, upon open conference with the Street Committee of said City Council he was assured that the desired amendments would be made

on condition that he would deposit \$10,000.00 in one of the banks of the City of Richmond, Va., upon the terms and provisions of a paper to be prepared by the City Attorney, as a pledge of his intention and ability to build the road, which deposit your petitioner made, and, being thus assured of his charter, went North to see his financial backers and to prepare for the vigorous prosecution of his enterprise.

3. Arrived in New York, he was surprised to find one Phil. B. Sheild, an attorney at law of Richmond, Virginia, in conference with the parties, Messrs. Stewart & Co., Wall street brokers, who had undertaken to furnish the necessary capital for his (petitioner's) enterprise, said Sheild urging said brokers to back him and his associates, who were seeking to induce the City Council of Richmond, Virginia, to grant the franchise for the Broad street railway to them, under the name and style of the Richmond Traction Company, instead of to your petitioner and his associates, under the name and style of the Richmond Conduit Railway Company.

4. After some conference, by the advice of Messrs. Stewart & Co., who were to furnish capital for building the road as aforesaid, an amicable understanding and basis of co-operation was arrived at between the two parties represented respectively by your petitioner and said Sheild, which was embodied in a contract, in the shape of a joint letter addressed to S. H. G. Stewart, Esq., head of the house of Stewart & Co., which letter is in the following words and figures, to-wit:

“ New York, August 9th, 1895.

“ S. H. G. Stewart, Esq. :

“ 40 Wall Street, City.

“ Dear Sir :

“ We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being inter-

ested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER,

"(Signed) PHIL. B. SHEILD."

5. Your petitioner and his associates in good faith performed their part of this contract, and upon this basis the franchise was granted by the City Council of Richmond to the "Richmond Traction Company," it being understood with said Sheild, representing his Traction associates, that the names of your petitioner and two of his associates and of three from the Traction side were to be inserted in the franchise, as incorporators.

6. Said Sheild and his Traction associates, how-

ever, utterly failed to carry out their part of said contract, and, leaving out the names of petitioner and his associates, procured the grant of the franchise contemplated in said letter of August 9th, 1895, to incorporators, all of them of the Traction side, and ultimately, when petitioner demanded an explanation, in terms repudiated the obligations of the contract, denied that the Richmond Traction Company was bound thereby, and denied any and all rights of your petitioner thereunder, or in the Traction franchise and enterprise.

7. Your petitioner published the above contract of August 9, 1896, in a Richmond (Va.) newspaper before the final passage of the ordinance granting said Richmond Traction franchise to Phil. B. Sheild and others, and promptly thereafter gave, to all parties known to be interested in the Richmond Traction Company and its said franchise and enterprise, the fullest notice practicable of his rights and claims in the premises, and being met only by repeated and contemptuous denial of said rights, on the 30th day of October, 1895, he brought his bill, in the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, setting forth in fuller form the above-recited facts, making an exhibit of the Traction franchise or ordinance, making parties of said Richmond Traction Company, the incorporators mentioned in said ordinance, and all other persons known to be interested in said Traction franchise and enterprise, alleging that all said parties had acted with full notice and knowledge of petitioner's rights in the premises; that he had been unjustly deprived of said rights, and would be exposed to irreparable injury unless the court should interfere by injunction to prevent said franchise, or any part thereof, from being transferred, assigned or encumbered to or in favor of innocent parties unaffected with notice of petitioner's rights. Said bill prayed such injunction; that the court would by its decree declare him entitled to a full one-half interest in and under said contract of August 9th, 1895, with said Sheild and associates, and, upon the basis

of said contract, entitled to a full one-half interest in said Richmond Traction Company's franchise, enterprise, property and stock; that specific execution of said contract be decreed and enforced; that all parties defendant be required to answer and to do and perform every act necessary or requisite to the vesting of petitioner's full rights in the premises, and for general relief.

8. To this bill the defendants demurred, on the ground of insufficiency and lack of equity, and that petitioner's remedy, if any, was at law.

9. Subsequently, by leave of court, petitioner filed his amended and supplemental bill, incorporating the original bill and reciting facts which had transpired since it was filed which rendered the amended bill necessary, to-wit: the subscription to stock, its issue to parties having notice of your petitioner's rights as paid-up stock without any payment whatever therefor, the organization of the Traction Company, the authorization, execution and recordation of a mortgage upon its franchise and all its property to secure \$500,000 of bonds: all of which proceedings the amended bill charged to have been had and taken after full notice of petitioner's rights, as set out in his original bill, and to be, on several specified grounds, null and void as against petitioner. Said amended bill thereupon prayed for relief by injunction and the appointment of a receiver; that all proper inquiries be had and accounts taken; that, by decree of court, all said recited proceedings be declared null and void and set aside; that the franchise be disencumbered of all the burdens by said proceedings imposed upon it; and that petitioner be decreed his full rights in said disencumbered and restored franchise, and for general relief.

10. To the bill as thus amended the defendants filed their demurrer, specifying nine grounds, only two of which, however, need be noticed, for the purpose of this petition, to-wit:

(A.) That there can be no recovery upon the contract

relied upon by petitioner, the same being void as contrary to public policy.

(B.) That the remedy upon said contract, if any, is at law.

11. Upon the filing of said demurrer, your petitioner, not because he considered his said bills, fairly construed, to be defective, but because they contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making or carrying out of said contract of August 9th, 1895, filed his petition asking leave to amend his said original and amended and supplemental bills, in the manner fully and exactly set out upon the face of said petition, so that the amended paragraphs of said bills should read as therein set out. After full argument, the honorable Circuit Court, on the 6th of April, 1896, Judge Goff sitting, entered an order, from which the following is an extract :

“on consideration whereof, it is hereby ordered that said petition be filed, and that the complainant have leave to amend the said bills, in the particulars set out in his said petition, which is hereby done.” (See page 66 of record.)

Your petitioner, however, for the sake of clearness, filed in the Clerk's Office of the Circuit Court, on the 18th day of April, 1896, a complete draft of his amended and supplemental bills, as the same read with all amendments allowed by the aforesaid order of April 6th, 1896, which was thereafter designated as “complainant's second amended and supplemental bill,” delivering to all defendants copies of the same; and said defendants, on May 4, 1896, filed their demurrer thereto which was set down for argument, all of which was particularly set out in a preliminary decree entered by the Circuit Court on the 22nd day of August, 1896, and the same court, Judge Nathan Goff sitting, by its final decree of August 22nd, 1896, declared that the

cause came on to be heard "upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is is to say, the amended and supplemental bill as amended by the decree herein of April 6, 1896, and in the form filed on the 18th day of April, 1896)."

The last named bill contains, among others, the following allegations and statements of facts, viz:

"Mr. Hyer agreed that the Traction ordinance should take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the City of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the City of Richmond the franchise set out in the said contract of August 9th, 1895, and your orator was to keep the \$10,000.00 in Richmond until the 17th day of August, 1895, but subject to the condition set out in in the said contract."

* * * * *

"At this same interview, said Sheild asked your orator what names of his associates should be inserted in the Traction ordinance. He insisted that he must have your orator's name, and he also desired to use the names of one or two of your orator's associates whom he specified. Your orator could not, at that moment, give definite instructions, but the next day he wired his friends in Richmond, whither Sheild had returned, desiring them to see him, and to have inserted in the Traction ordinance your orator's name and the names of two of his friends and associates who were specified. For a day or two subsequent to the signing of said contract of August 9th, 1895, said Sheild and his associates several times wired your orator as to sundry details of the joint enterprise, especially urging him, by all means, to see that the \$10,000.00 on deposit in Richmond, should be detained there until the meeting of the Council—an indispensable service which your orator rendered, although not at the time having received

the telegrams referred to. And not only so, but your orator and his associates openly, publicly and fully carried out and performed each, all and every of the promises and covenants of your orator, in behalf of himself and associates, contained in said contract of August 9th, 1895."

"And your orator here takes occasion to state that he applied for and obtained leave of court to amend this, his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees; not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895.

"Your orator here and now states and charges, not only that no such impression was intended to be conveyed by the bill, but that nothing approximating to it in fact occurred. On the contrary, the entire history of the Broadstreet franchise before the City Council and its committees was a matter of the utmost publicity. The original Conduit Railway franchise of your orator had been fully considered and discussed before the Council and by the business community, and the proposed amendments of it were publicly offered, considered and adopted before the Committee on Streets, and then printed; and when the Traction franchise was applied for in place of the Conduit franchise, this also was openly done before the same committee; the existence and substance of the contract of August 9th, being generally and fully known by the Council of Richmond and the public generally, and in no way concealed or suppressed, and it being also well and thoroughly understood by the Committee on Streets that the Conduit people and the Traction people had gotten together, upon the basis of this latter franchise, with the understanding that the two sides should have equal right and representation in the new company."

As petitioner views the matter, his bills, as last amended (page 81-98 of the record) *i. e.*, the bills upon which the cause was heard, do not contain a word which gives color to the suggestion that the contract upon which he relies is violative of public policy. Said bills were also amended by the insertion of a direct charge of the utter insolvency of Phil. B. Sheild, which has an evident and important bearing upon the defense that petitioner has a plain, adequate and complete remedy at law.

12. Nevertheless, substantially the same grounds of demurrer—one being added, now ten in all—were interposed to the bills in their final form (pages 114-115 of the the record).

The cause was thereupon argued and submitted, pursuant to a preliminary decree, which will be found on pages 118-119 of the record, and, on the 22nd day of August, 1896, the following final decree was entered, *co-wit* :

“This cause having been argued before this court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 15th days of May, 1896, upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is to say, the amended and supplemental bill as amended by the decree herein of April 6th, 1896, and in the form filed on the 18th day of April, 1896), the court filed its opinion on the 5th day of August, 1896, hereby made a part of the record, holding that the first, second and third grounds of demurrer assigned by the defendant in their said demurrer are not well taken and must be overruled; that the fourth ground of demurrer assigned in the said demurrer is well taken and must be sustained, and that having reached the conclusion last stated, the six remaining grounds of demurrer assigned by the defendants would not be considered.

“Thereupon it is adjudged and decreed :

“First. That the first, second and third grounds of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, to the second amended and supplemental bill filed by the com-

plainant, be, and the same are, hereby overruled.

"Second. That the fourth ground of demurrer assigned by the defendants in said demurrer filed May 4th, 1896, be and the same is hereby sustained, and all bills filed by the complainant are, for this reason, hereby dismissed, with costs to the defendant, to be taxed by the clerk; and the remaining six grounds of demurrer assigned by the defendants are not considered or determined by the court."

On the 6th day of October, 1896, an appeal was allowed your petitioner by said Circuit Court, from its said final decree, to the United States Circuit Court of Appeals for the Fourth Judicial Circuit, the assignment of errors therewith being as follows, caption and signature omitted, to-wit:

"And now, on this 6th day of October, 1896, came the petitioner, L. H. Hyer, plaintiff in the above entitled suit, by Stiles & Holladay, his solicitors, and says that the decree entered in the said cause on the 22nd day of August, 1896, dismissing all bills filed by the said L. H. Hyer in the above entitled cause, is erroneous and against the rights of the appellant, L. H. Hyer; and said petitioner, L. H. Hyer, appellant, assigns for error, and will contend, in the Appellate Court, that the court below erred as follows:

1.

"First. That the court erred in sustaining the fourth ground of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, and, for the reasons assigned in said fourth ground of demurrer, dismissing all bills filed by the complainant, L. H. Hyer. The said fourth ground of demurrer assigned by the defendants in said demurrer, filed May 4th, 1896, is in the following words and figures, to-wit:

["IV. That the contract and agreement set forth in said bill as the sole cause of action of the said complainant is against public policy,

and null and void; and no court of equity will enforce the same."

This 4th ground of demurrer will be found on page 115 of the record, and was not copied in the assignment of errors.]

"The appellant, L. H. Hyer, respectfully submits and will contend in the Appellate Court that the contract and agreement set forth in his bills filed in this cause, and referred to in said demurrer, were and are perfectly valid and lawful in all respects; that said contract and agreement are in no manner contrary to public policy; that the court below erred in holding said contract and agreement to be contrary to public policy, and therefore null and void, and erred in declining to enforce specific performance of the said contract and agreement; and erred in dismissing the bills filed by L. H. Hyer, or either of them.

2.

"Second. That the court erred in sustaining the demurrer filed by the defendants, and erred in dismissing all bills filed by the said L. H. Hyer, or either of them. The contract and agreement set out in the bills filed by the said L. H. Hyer state a plain case for relief in a court of equity; the court below should have overruled all demurrers filed by the defendants herein, and each and every ground of demurrer assigned by the defendants in their said demurrers, and should have retained jurisdiction of this suit and granted the relief prayed by the said L. H. Hyer in his said bills.

3.

"Third. That the court in dismissing the bills filed by the said L. H. Hyer in this cause, or either of them, for the reasons set out in the said decree herein of August 22nd, 1896, and the opinion of the court mentioned herein and made a part of the record; and erred in dismissing the said bills, or either of them, for any reason.

4.

"Fourth. For these and other reasons appearing upon the record of said decree of August 22nd, 1896, your petitioner prays for an appeal from and supersedeas to said decree, and that the said decree may be reviewed and reversed."

This appeal was duly perfected and prosecuted and the case was argued in the appellate court, before the Chief Justice and Judges Simonton and Brawley, and submitted at the February term, 1897; and on the 14th day of May, 1897, opinions were filed by Judges Simonton and Brawley, and the following decree of affirmance was entered by the honorable Circuit Court of Appeals:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause, be, and the same is hereby, affirmed, without prejudice, with costs.

"It is further ordered that the mandate of the court issue after the expiration of twenty days from the date hereof."

A certified copy of the entire record of the cause in the Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this honorable court, and the same is marked Exhibit "A." Petitioner has made references to this record, throughout his petition, for the convenience of the court.

Of the ten grounds of demurrer interposed by the defendants to petitioner's bills, as filed April 18th, 1896, only two were dignified by notice or mention by the honorable judges of the Circuit Court of Appeals. Of the remaining eight, several were virtually abandoned by counsel in the oral argument.

Indeed, it may be said that there are but *two* real questions in the case, and that the demurrer to petitioner's bills must be overruled unless sustained upon one or other of these two grounds.

IMPORTANCE OF THE QUESTIONS.

It is not contended that both these questions are of such general interest as to require or deserve review by this great tribunal. Whether in any particular case the remedy be *at law* or *in equity* is ordinarily a question which concerns that case and its litigants only; but the PUBLIC POLICY defence presented by this record is of *very great interest and importance, at once to the general public and to the Legislative and Judicial departments of every city and State in the Union, and of the General Government as well*—and that in a double aspect, to-wit:

1ST. WHETHER IT BE NECESSARILY CONTRARY TO PUBLIC POLICY FOR RIVAL APPLICANTS FOR A LEGISLATIVE CHARTER OR FRANCHISE TO UNITE, AND AGREE TO ASK THE GRANT OF THE FRANCHISE TO THEM JOINTLY, GOING OPENLY BEFORE THE LEGISLATIVE BODY AND MAKING A FULL DISCLOSURE OF THEIR CONTRACT AND CO-OPERATION?

And if the above be answered in the affirmative, then—

2ND. WHETHER, AFTER A CONTRACT CONTRARY TO PUBLIC POLICY HAS BEEN CONSUMMATED, AND THE FRANCHISE OR OTHER BENEFIT CONTEMPLATED IN SUCH CONTRACT HAS BEEN SECURED, AND ONE PARTY HAS APPROPRIATED ALL THE BENEFIT, AND THE OTHER SEEKS JUSTICE AT THE HANDS OF THE COURT AND A FAIR DIVISION; WHETHER, WE SAY—UNDER SUCH CIRCUMSTANCES—A COURT OF EQUITY AND OF CONSCIENCE WILL ENTERTAIN AND APPROVE THE PLEA OF THE WRONG-DOER, THAT THE ORIGINAL CONTRACT WAS IMMORAL AND INVALID?

Petitioner submits that elaborate and emphatic statement can add nothing to the gravity and general interest of these great questions. It is clear beyond dispute that their importance calls for review by this honorable court, and fully justifies the issue of the writ of *certiorari* to the honorable Circuit Court of Appeals for the Fourth Judicial Circuit.

DIVERGENCE BETWEEN THE JUDGES.

But there is another ground upon which the petitioner confidently asks the issue of the writ. Especially is it desirable that questions of grave import should be reviewed by this honorable court of last resort, where there has been no harmonious or consistent decision of these questions below.

It is seldom that a record presents a more extreme instance of divergence of view by the Bench. The judges who have this far passed upon the case are Judge Goff, Senior Circuit Judge, who heard it alone in the Circuit Court, and Mr. Chief Justice Fuller, Circuit Judge Simon-ton and District Judge Brawley, who sat in the case upon appeal in the Circuit Court of Appeals. As above stated, the grave points in the case are two only—Public Policy and Remedy at Law.

JUDGE GOFF.

Upon the *second* of these questions, Judge Goff, in his opinion (Record, pages 116-117), says: "The third reason assigned is that the complainant has a plain, complete and adequate remedy at law, if any he has, against the defendants in the case made by the bills. I do not concur with counsel for the defendants in the argument submitted on this point, and, so far as it is concerned, the demurrer must be overruled. In my judgment, in cases of this character, where specific performance is claimed, complete and adequate remedy can only be had in a court of equity." From this decision of this point no formal appeal was taken, and little attention was paid to the point by either side in the appellate court. Indeed, petitioner's counsel questioned whether this position had not been virtually abandoned by the other side, who seemed to rest their entire case, upon appeal, upon the Public Policy defense, fortified, as it was, by Judge Goff's favorable decision. So marked was this failure to argue the jurisdictional question in the appellate court that, on the 12th day of May, 1897, but two days be-

fore the final decision of the case, a decree was entered calling for further argument upon the question whether the complainant had a plain, adequate and complete remedy at law, if any he had.

It would seem that the case finally drifted, possibly through lack of opportunity for personal conference between the judges, into a decision adverse and fatal to petitioner's rights, by concurrence upon this jurisdictional point between the Chief Justice and Judge Simonton,—without the further argument called for being had.

As hereinbefore stated, Judge Goff declared, by his two decrees of August 22, 1896, that he heard and considered the cause upon the second amended bill filed April 18, 1896, and upon the *first* question, to-wit: that of Public Policy, with some hesitation, sustained the defense and, on this ground alone, overruled the demurrer. In his written opinion he says: "While none of the cases cited are exactly similar to the one I now consider, still many of them have points in common with it, and the reasoning of the courts in the able opinions referred to, by which the rule of law mentioned has now been well established, includes in my judgment, contracts of the character set up and relied upon by the complainant. I think that the contract, the specific performance of which is the object of this suit, the intention of which was to withdraw competition from before the City Council of the City of Richmond, is void, because against Public Policy, and I shall, therefore, decline to enforce the same." But, later in his opinion, the learned Judge makes this statement: "This case involves questions of great importance not only to the complainant, but to the country at large, and its early decision by the court of last resort is desirable, not only because of the interest of the parties to the controversy, but also because the public is concerned in the early and proper adjustment of the same."

JUDGE SIMONTON.

As above noted in Judge Goff's decree (pages 119-120 of the record), this cause was heard by him "upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is to say, the amended and supplemental bill as amended by the decree herein of April 6th, 1896, and in the form filed on the 18th day of April, 1896);" yet Judge Simonton, while affirming Judge Goff upon the public policy defense, evidently bases his opinion upon the complainant's original bill before amendment; for he not only refers to the defendants' demurrer "setting forth nine grounds of demurrer," which was the demurrer filed prior to last amendment, but, to sustain his views that the contract between Hyer and Sheild involved features contrary to public policy, quotes from the bill as it stood prior to said amendment, *i. e.*, he quotes from said bill clauses and expressions which had been stricken therefrom under Judge Goff's decree of April 6th, 1896, and which are not to be found in the second amended and supplemental bill filed April 18, 1896, upon which Judge Goff heard and decided the cause.

JUDGE BRAWLEY.

Judge Brawley dissented, in a very vigorous opinion from which we make the following extracts:

"BRAWLEY, District Judge:

"I dissent. Hyer and Shield were rival promoters, each seeking from the City Council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise.

"Hyer had already obtained a franchise from the Council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both or in the obtaining of a franchise of such nature that capital would not embark in it, advised the

parties to come together, and they united in an agreement for mutual co-operation and for an equal division of whatever profits were realized. The agreement does not on its face bear any of the *indicia* which mark a dishonest purpose. It does not show, nor can it be reasonably inferred, that any sinister, extraneous or corrupting influences were to be brought to bear upon the City Council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise."

* * * * *

"That Hyer and Shield had made this agreement was no secret. The fact was published in the newspapers in Richmond on the afternoon before the City Council passed the ordinance granting the franchise, and we have no complaint from that city, from the party supposed to be injuriously affected, that the suppression of competition has induced the granting of a franchise not duly regardful of the public interests. The bill states that it was Hyer's intention to lay the whole matter of this agreement before the City Council, and there is no ground for the suspicion that there was any concealment. I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp vs. Taylor* and approved in *McBlair vs. Gibbs* and *Brooks vs. Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the fran-

chise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the court is not sought to enforce it nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed, one of the parties is in possession of all the fruits and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits.

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract of his own seeking on the ground that it was immoral, and, therefore, that he has the right to make off with the swag."

THE CHIEF JUSTICE.

The Chief Justice filed no written opinion. It is stated at the bottom of Judge Simonton's opinion that "The Chief Justice concurred in the result, on the ground that the remedy of the complainant, if any, was at law."

Evidently, then, the Chief Justice did *not* concur in Judge Simonton's opinion upon the question of public policy; and, as Judge Simonton informed counsel on both sides, at the time of its entry, that the decree of May 12th, 1897, calling for further argument upon the question of "remedy at law" was entered at the wish of the Chief Justice, the case would seem not to have received a very conclusive settlement; and yet it is clear that your petitioner is remediless, the decision thus rendered against him being final and fatal to his rights, unless this honorable court issue its writ of *certiorari* to the Honorable Circuit Court of Appeals, as in this petition prayed.

Errors Complained Of.

Petitioner is advised and complains that the decree of the honorable circuit court of the 22d day of August, 1896, is erroneous for the reasons set forth in his assignment of errors in that court, hereinbefore recited, and that the decree of the honorable circuit court of appeals of the 14th day of May, 1897, is erroneous, in that it affirmed said decree of the circuit court, and also because it affirmed said decree upon a ground which is itself error, to wit, that "the remedy of the complainant, if any he has, is plain, adequate, and complete at law."

Your petitioner now respectfully submits that at least one of the questions involved in his cause and stated in his petition is of sufficiently "general interest and importance" and sufficiently "open to controversy" to justify the issue of the writ of *certiorari*, and should be authoritatively and finally adjudged by this honorable court upon and after full presentation to the court of the merits of the said question and of petitioner's cause by both parties to the controversy.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the cause therein entitled L. H. Hyer, appellant, *versus* The Richmond Traction Company *et al.*, appellees, No. 198, to the end that the said cause may be reviewed and determined by this court, as provided by law; that the decree of the said circuit court of appeals in the said cause, entered on the 14th day of May, 1897, affirming the decree of the circuit court of the United States for the eastern district of Virginia, entered August 22d, 1896, sustaining the defendants' de-

murrer to the complainant's bills and dismissing said bills with costs, be reversed and annulled; that the said demurrer be overruled and the cause remanded to the circuit court of the United States for the eastern district of Virginia for further proceedings therein according to law, and that petitioner may have such other, further, general and complete relief in the premises as may be agreeable to equity and to this court may seem appropriate.

And your petitioner, as in duty bound, will ever pray, &c.
L. H. HYER.

ROBERT STILES, *Solicitor*.

"DISTRICT OF COLUMBIA, {
"City of Washington, { ss :

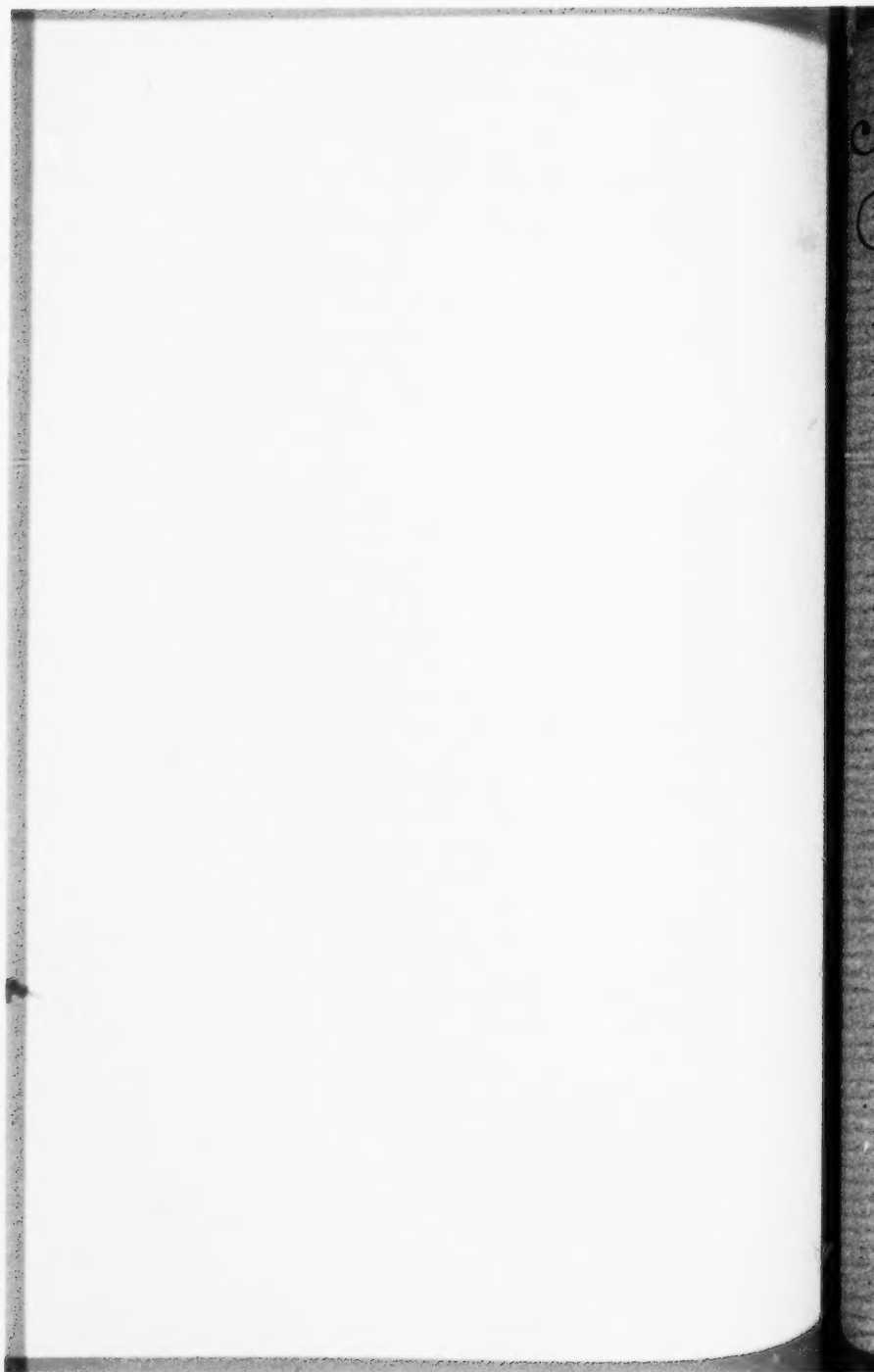
"Before the undersigned, a notary public in and for the District of Columbia, appeared L. H. Hyer, who, being duly sworn, says that he is the L. H. Hyer who is the petitioner in the above petition, whose name is signed thereto and to this affidavit, and the party complainant and appellant in the litigation in the circuit court of the United States for the eastern district of Virginia, and in the United States circuit court of appeals for the fourth judicial circuit, in said petition referred to; that he read the said petition before subscribing the same, and that the facts therein stated are true to the best of his knowledge, information, and belief.

"L. H. HYER.

"Sworn to and subscribed before me this 22d day of May, 1897.

[SEAL.]

"JAMES D. MAHER,
"Notary Public."



4th Div. 379.

FILED
MAY 22 1894
JAMES H. MCKEN

Brief of Stiles for Petitioner

813

Filed May 22, 1894.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

L. H. HYER, APPELLANT,

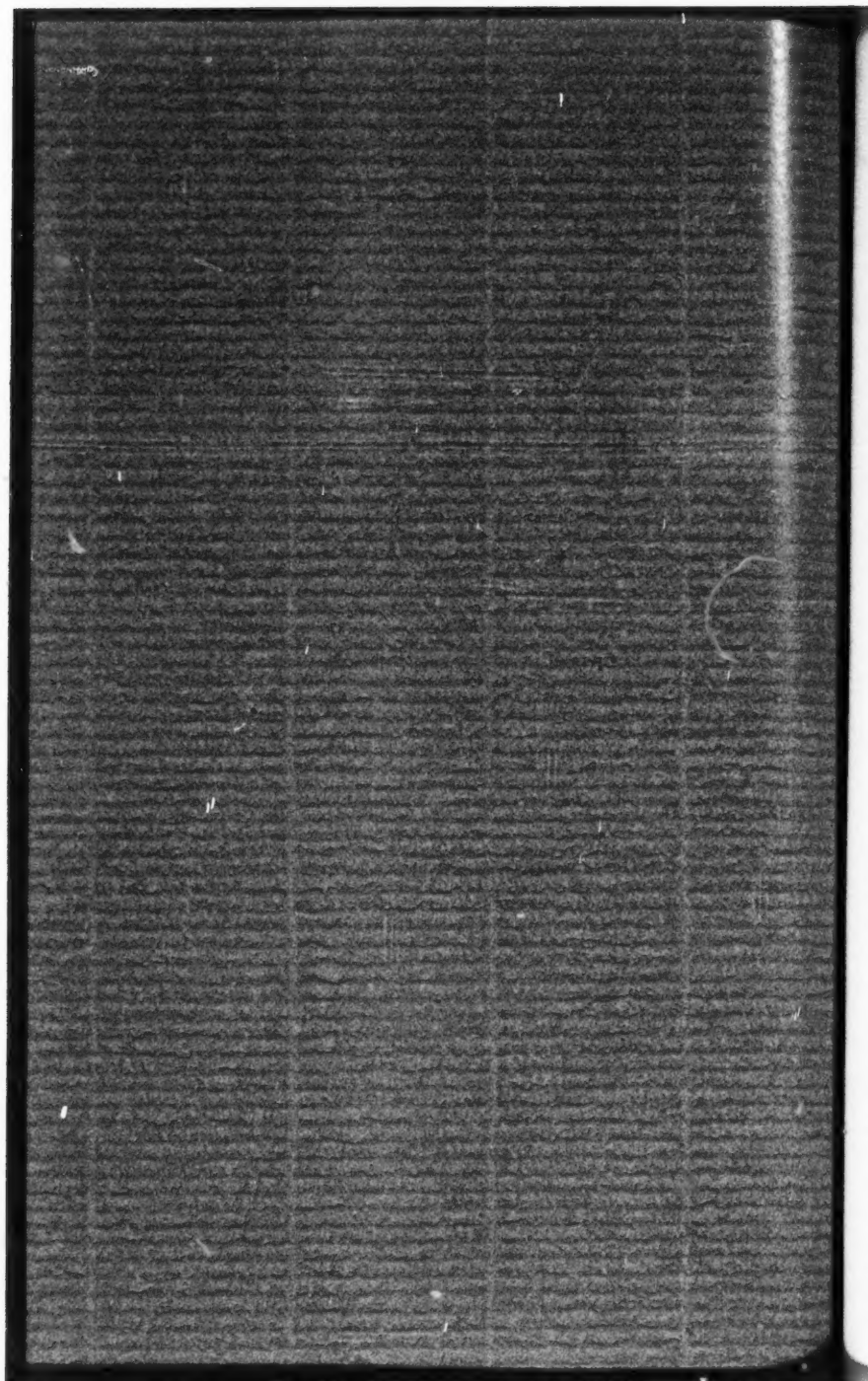
VERSUS

RICHMOND TRACTION COMPANY ET AL,

APPELLEES.

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR
CERTIORARI.

ROBERT STILES,
ADDISON L. HOLLADAY, } Solicitors.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

L. H. HYER, APPELLANT,

versus

RICHMOND TRACTION COMPANY ET AL.,
APPELLEES.

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR
CERTIORARI.

CERTIORARI.

It is deemed in every way desirable that this paper shall be as brief as practicable, and therefore the fundamental proposition, of the general availability of the case for the writ of *certiorari*, will be assumed, to-wit :

1. The sole ground of Federal jurisdiction in the cause being the citizenship of the parties, the decree of the Circuit Court of Appeals of May 14th, 1897, is "final" and no appeal lies ; hence, in the general, *certiorari* lies.

It is almost equally evident that the more meritorious basis for the issue of the writ exists, to-wit :

2. Questions of unusual gravity and importance, not only to the parties litigant, but to the general public—to the legislation and the jurisprudence of the States and the country—are involved; and the application for the writ, upon its very face, shows that these questions are “open to controversy,” and demonstrates the necessity for the exercise of the reviewing power of this honorable court, in order to maintain the supremacy of its own rulings, and that consistency, harmony and uniformity which should characterize the most important appellate jurisdiction known to human law, and which the authors of the act of March 3rd, 1891, creating the Circuit Courts of Appeals, so obviously had in mind.

Lau Ow Bew, Petitioner, 141 U. S., 583-587; 144 U. S., 47, 58.

Forsyth vs. City of Hammond, 17 S. C. R., 666, 668.

ONLY TWO QUESTIONS INVOLVED.

The petition calls attention to a feature of the case which the record and history of the litigation and the opinions of the judges brings out with great prominence, to-wit: the elaboration of the pleading on both sides. The allegations of the bills are somewhat prolix, and they were several times amended, for which ragged work we shall not attempt further apology. To the bill as last amended, *i. e.*, in the form in which the case was heard and submitted, no less than ten (10) grounds of demurrer were assigned; but, as we think, and as the record shows, these points were gradually weeded out and sifted down until but two questions remained, which were dignified with any notice from the bench, or seemed to be much regarded by counsel on either side, to-wit: as several times stated in the petition.

1. Whether the contract sued upon was against public policy and therefore void?

2. Whether the remedy upon said contract, if any, was at law.

Or, yet more tersely stated, the real defenses are two only—Public Policy and Remedy at Law; and taking them up in inverse order—*first* :

REMEDY AT LAW.

As to this point, it may be that the court would not consider the question of remedy at law, if standing alone, of sufficient importance to jurisprudence or the general public, to justify the allowance of a writ of *certiorari*; yet, lest the cause should suffer unconscious prejudice in the minds of any of the bench, though lack of reference to this question, more especially because the concurrence between two of the judges of the Circuit Court of Appeals was upon this point,—it is deemed proper to call special attention to the fact that his honor, Judge Goff, who, in the Circuit Court, heard full and elaborate argument upon the point, entertained no doubt as to it, but confidently held that the complainant was without remedy at law, and that his case belonged to a class clearly within the jurisdiction of equity, where alone he could find adequate relief.

In the Circuit Court of Appeals, notwithstanding the fact that there was little or no argument upon the point, chiefly because the appellees seemed to acquiesce in Judge Goff's decision of it and to throw their entire strength upon the Public Policy defence which he had sustained, Judge Brawley *dissented* from the judgment of affirmance and held, as we understand his opinion, that the contract of August 9th, 1895, between Hyer and Sheild was not only valid and binding, but enforceable in a court of equity. Certainly he did *not* hold "that the remedy of the complainant, if any he has, is plain, adequate and complete at law."

The closing words of his opinion are " * * * but the plaintiff is entitled either in a suit at law, or by amendment to the bill, to an accounting for such share of the profits of the undertaking as were or should have

been realized under his contract with his co-promoter." This language, taken in connection with that part of Judge Brawley's opinion, in which he says: "I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp vs. Taylor*, and approved in *McBlair vs. Gibbes* and *Brooks vs. Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable, * * *," seems clearly to sustain our view of Judge Brawley's opinion.

The Chief Justice, being evidently of opinion that there ought to be a remedy somewhere, called for further argument upon the question whether there was such remedy at law, and it is believed would to-day be far from averse to hearing such argument. It is further believed that such argument will hereafter be had upon this point before this honorable court, and, when that argument is had, it is confidently hoped that this court will concur in opinion with the only Judge who has yet had this question fully discussed before him.

PUBLIC POLICY.

It is not proposed to enter upon a full discussion of this very broad subject. It is without doubt one of the most important and delicate which can come before a judicial body, and has required and received the most laborious, patient and conscientious attention from the loftiest tribunals of the world—this honorable court and the British House of Lords. It goes without saying that, especially in that class of cases to which the case at bar belongs—where the question of public policy is raised as to a contract affecting or connected with proposed legislation—this court would be most ready to grant the writ of *certiorari* to bring before it the record and the decision of another Federal Court, and most especially where, as here, the judges composing that court have divided upon this question.

It may be well at the outset to spread upon the face of this brief the contract under examination—that the court may have it conveniently at hand, and that the view of the eye may lead the thought of the brain.

“New York, August 9th, 1895.

“S. H. G. Stewart, Esq. .

“40 Wall Street, City.

“Dear Sir :

“We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

“It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

“Among ourselves we will decide what names

are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER,

"(Signed) PHIL. B. SHEILD."

The general head of Public Policy, as applicable to the contract embodied in this letter, and to the facts and circumstances set out in the bill as leading up to and following it, divides itself into two questions, the *first* of which may be thus stated :

IS IT NECESSARILY CONTRARY TO PUBLIC POLICY FOR TWO RIVAL APPLICANTS FOR A LEGISLATIVE CHARTER TO UNITE, AND AGREE TO ASK THE GRANT OF THE FRANCHISE TO THEM JOINTLY, GOING OPENLY BEFORE THE LEGISLATIVE BODY AND MAKING A FULL DISCLOSURE OF THEIR CONTRACT AND CO-OPERATION ?

The exact relevancy of the question to the case, and the answer that must be returned to it, are equally obvious. Precisely this is what Hyer and Sheild did ; and it is not perceived how the propriety or legality of their action can be called in question. The highest public policy, as Judge Brawley says, "requires that men should perform their contracts" ; but, if men cannot be allowed to make a contract such as this, and if when made they cannot be compelled to perform it—then there would seem to an end at once to the liberty and the obligation of human contract.

We do not scruple to declare and to insist that this is the case—and the whole case—upon this branch of it. Whatever "loose expressions" (and they were nothing more) there may have been in the original bill as it stood before amendment, capable of being distorted into the semblance or the suggestion of wrong, they were all, after full argument, stricken bodily out, and the complainant was permitted to aver, and did aver, that the utmost candor and publicity was intended and practiced in the

making and carrying out of the contract of August 9th, 1895; that no impression as to the use of illegal or improper influence was intended to be conveyed, and that nothing approximating to it in fact occurred.

When the letter above quoted is read in the light of this statement—which, upon demurrer, must be taken to be true—it may almost be said even that reasonable doubt is excluded. Nothing is left in the case, as a plausible basis for discussion, except the bugbear of “withdrawal of competition,” and even this is not a plausible basis in this case, since it is left uncertain in the contract as to the motive power of the projected railway, and whether it should be applied overhead or underground; and in the franchise, as subsequently granted, the city reserved the entire question of motive power, leaving it under the control of the Council, with express reservation of the right to revoke the permission to use electricity as such motive power, or to put any further conditions, restrictions and regulations upon such use. See letter to Stewart, and 5th section of Traction ordinance, page 21 of record.

Upon the question whether the contract between Shield and Hyer is one of the class of contracts ordinarily condemned and annulled by the courts as violation of public policy, Judge Brawley, in his opinion, says:

“* * * Hyer and Shield were rival promoters, each seeking from the City Council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise.

“Hyer had already obtained a franchise from the Council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they united in an agreement for mutual co-operation and for an equal division of whatever profits were realized. The agreement does not on its face bear any of the *indicia* which mark a dishonest purpose. It does not show, nor can it be reasonably in-

ferred, that any sinister, extraneous or corrupting influences were to be brought to bear upon the City Council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise."

Upon the question whether the coming together of Sheild and Hyer and their agreement to ask the grant of the franchise to them jointly, was calculated to lessen competition for said franchise, to the disadvantage of the public and of the city of Richmond, Judge Brawley further says:

"It is not contended, nor can it be assumed, that Hyer or Shield, either or both, had such control or monopoly of the building of street railways that they could by combination put up the price or demand an unusual or unreasonable franchise or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or non-action. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right."

"The franchise in question was not a thing that was put up at public auction and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The City Council of Richmond, faithful, as it must be assumed, to its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an object

which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and to hold a contract void because its tendency may be to defeat competition it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfilment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint co-operation, and they voluntarily combine in furtherance of the enterprise, there can be no objection to it if it is done honestly and in good faith. Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish the desired end, it should be sustained. "If there is one thing," says Sir George Jessel in a recent case, "which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

"All presumptions are in favor of the legality of contracts—all reasonable intendments are indulged to support them—if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion can be drawn from them, for intention to violate the law is not to be presumed."

The following are some of the leading authorities which establish the qualifications and limitations of the doctrine as to the invalidation of contracts, by provisions tending to the *lessening or withdrawal of competition*—limitations which clearly exclude the case at bar from the class of contracts held void upon this ground, and which

are ably applied to the facts of this case in the extract just given from Judge Brawley's opinion :

- Kearney vs. Taylor*, 15 How'd, 493, 519-521.
Wicker vs. Hoppock, 6 Wal., 94, 97-8.
Atchison vs. Mullen, 43 N. Y., 147, 150-51.
March vs. Russell, 66 N. Y., 288.
Smull vs. Jones, 6 W. & S., 122.
Phippen vs. Stickney, 3 Met., 384, 388-9.
Gibbs vs. Smith, 115 Mass., 592-3.

PRESUMPTION IN FAVOR OF THE VALIDITY OF CONTRACTS ASSAILED AS CONTRARY TO PUBLIC POLICY :

- Registering Co. vs. Sampson*, L. R. 19 Eq. Cases, 462, 465.
Lewis vs. Darison, 4 M. & W. (Exchq.), 653.
Aubin vs. Holt, 2 K. & Johns, 68.
Sessions vs. Dixon, 5 B. & C., 758.
Bennett vs. Clough, 1 Barn. & Ald., 461.
Gale vs. Leckie, 2 Starkie, 107.
Tallis v. Tallis, 1 El. & Bl., 391.
Rousillon vs. Rousillon, 14 Ch. Div., 351.
Hobbs vs. McLean, 117 U. S., 525-6.
Bell vs. Mann & Dozier, 24 Gratt., 16.
Lorillard vs. Clyde, 89 N. Y., 384.
McBrantney vs. Chandler, 22 Kans., 692.
Kas. Pac. Ry. Co. vs. McCoy, 8 Kans., 546.
Richmond vs. Ry. Co., 26 Iowa, 202.

McBrantney vs. Chandler, 22 Kans., 692-3, holds :
 "There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having entered into, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence and the taint of wrong is matter of defence." His Honor Judge Brewer, who decided this

case, so ruled, not only with regard to a contract *for procuring legislation*, but, in 8 Kansas, 542, 546, with regard to a contract providing *for the use of money in procuring legislation*; and also in this 22 Kansas case, that if there was any evidence tending toward the validity of the contract, the case must not go off on demurrer, but be left with the jury. See also *Aubin vs. Holt*, 2 Kay & Johns, 68, holding that a contract only savoring of illegality, must be specifically enforced; *Bell & Mann vs. Dozier*, 24 Gratt., 16, that to make a contract contrary to public policy, it must be directly and plainly so; *Richmond v. Dubuque & S. C. Ry. Co.*, 26 Iowa 191, 202: "The power of courts to declare contracts void, as being against public policy, is a delicate and undefined one, and, like the power to declare a statute unconstitutional, should be exercised only in a case free from doubt." *Hobbs v. McLean*, 117 U. S.; and *Lorillard v. Clyde*, 86 N. Y., 384; that "Where a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted." "An agreement will not be assumed to be illegal when it is capable of a construction which will uphold and make it valid."

DECISIONS SUSTAINING CONTRACTS ASSAILED AS
AGAINST PUBLIC POLICY:

- Chesebrough vs. Conover*, 140 N. Y., 383-387.
- Berry vs. Capen*, 151 Mass., 99-102.
- Workman vs. Campbell*, 46 Mo., 306.
- Denison vs. Crawford Co.*, 48 Iowa, 211, 215-16.
- Moyer vs. Cantieny*, 21 Minn., 242.
- Beal vs. Polhemus*, 67 Mich., 130.

See also, in this connection:

- Spauldin vs. Mason*, 161 U. S., 376-397.
- Wylie vs. Cox*, 15 How., 415.
- Wright vs. Tibbetts*, 91 U. S., 252.
- Staunton vs. Embrey*, 93 U. S., 548.
- Taylor vs. Burriss*, 110 U. S., 42.
- Bridgford vs. City of Tusculumbia*, 16 Fed. Rep., 910.

The *second* of the two questions which the law of Public Policy propounds, when applied to the facts of the case at bar, is the following, to-wit:

WHETHER, AFTER A CONTRACT CONTRARY TO PUBLIC POLICY HAS BEEN CONSUMMATED, AND THE FRANCHISE (OR OTHER BENEFIT) CONTEMPLATED IN SUCH CONTRACT HAS BEEN SECURED, AND ONE PARTY HAS APPROPRIATED ALL THE BENEFIT, AND THE OTHER SEEKS JUSTICE AT THE HANDS OF THE COURT AND A FAIR DIVISION; WHETHER, WE SAY—UNDER SUCH CIRCUMSTANCES—A COURT OF EQUITY AND OF CONSCIENCE WILL ENTERTAIN AND APPROVE THE PLEA OF THE WRONGDOER, THAT THE ORIGINAL CONTRACT WAS IMMORAL AND INVALID?

Upon this branch of the case, Judge Brawley expresses himself as follows:

“That Hyer and Shield had made this agreement was no secret. The fact was published in the newspapers in Richmond on the afternoon before the City Council passed the ordinance granting the franchise, and we have no complaint from that city, from the party supposed to be injuriously affected, that the suppression of competition has induced the granting of a franchise not duly regardful of the public interests. The bill states that it was Hyer's intention to lay the whole matter of this agreement before the City Council, and there is no ground for the suspicion that there was any concealment. I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp vs. Taylor* and approved in *McBlair vs. Gibbes* and *Brooks vs. Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the franchise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the court is not sought to enforce it nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed, one of the parties is in possession of all the fruits and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits.”

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract of his own seeking on the ground that it was immoral, and, therefore, that he has the right to make off with the swag."

It will be observed that this second division of Judge Brawley's opinion is not suggested because of any uncertainty in his mind as to the soundness and sufficiency of the first ground upon which his opinion is based—to-wit: that the contract between Sheild and Hyer is clearly not against public policy, but, on the contrary, is free from the faintest taint or trace of any illegality or unsoundness. We desire to express our hearty concurrence in this, Judge Brawley's first and essential position, which we by no means intend to abandon or to discredit by citing and quoting from the authorities to which he, in his written opinion, and the Chief Justice orally, referred upon this second branch of the case.

The following is an extract from the opinion of the court delivered by Mr. Justice Miller, in the leading case, in 2 Wal., 70, 80-81:

BROOKS vs. MARTIN.

That great Judge said:

"In *Sharp vs. Taylor*, a case in the English Chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this con-

dition, she made several trips, which were profitable; and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with the plaintiff for his share of the profits, or to acknowledge his interest in the ship. When plaintiff brought his suit in Chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the court from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor Cottenham, and from his opinion we make the following extracts: 'The answer to the objection appears to me to be this—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when 'Taylor' (the defendant) 'received the money; and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any many affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant v. Elliot* and *Farmer v. Russell*, and recognized and approved by Sir William Grant, in *Thomson v. Thomson*."

"These cases are all reviewed in the opinion of this court in the case of *McBlair v. Gibbes*, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us."

See also—

Sharp vs. Taylor, 2 Phillips' Ch., 801.

McBlair vs. Gibbes, 17 How., 233.

Planters Bank vs. Union Bank, 16 Wal., 483,
499-500.

Union Pacific R. R. Co. vs. Durant, 95 U. S., 576.

Armstrong vs. Am. Exch. Bank, 133 U. S., 433,
466.

Farley vs. Hill, 150 U. S., 572, 575-6.

Burke vs. Flood et als., 1 Fed. Rep., 541, 548.

W. U. Telgph. Co. vs. U. P. Ry. Co., 3 Fed. Rep.,
423. 427.

Kingsbury vs. Burrill, 151 Mass., 199, 203.

It is believed that further argument and citation of authorities are unnecessary, and the cause is submitted, with respectful confidence that the *certiorari* prayed for in the accompanying application will be allowed.

ROBERT STILES,

ADDISON L. HOLLADAY,

Solicitors.



c/9 379.

(By. of Stiles & Holladay for)

Filed ^{IN THE} *Sept. 13, 1897*
Supreme Court of the United States.

October Term, 1897.

No. 379.

Supreme Court, U. S.

FILED

SEP 13 1897

JAMES H. MCKENNEY,
CLERK.

L. H. HYER, Petitioner,

vs.

RICHMOND TRACTION COMPANY, et al.

On Certiorari to United States Circuit Court of Appeals
for the Fourth Circuit.

OPENING

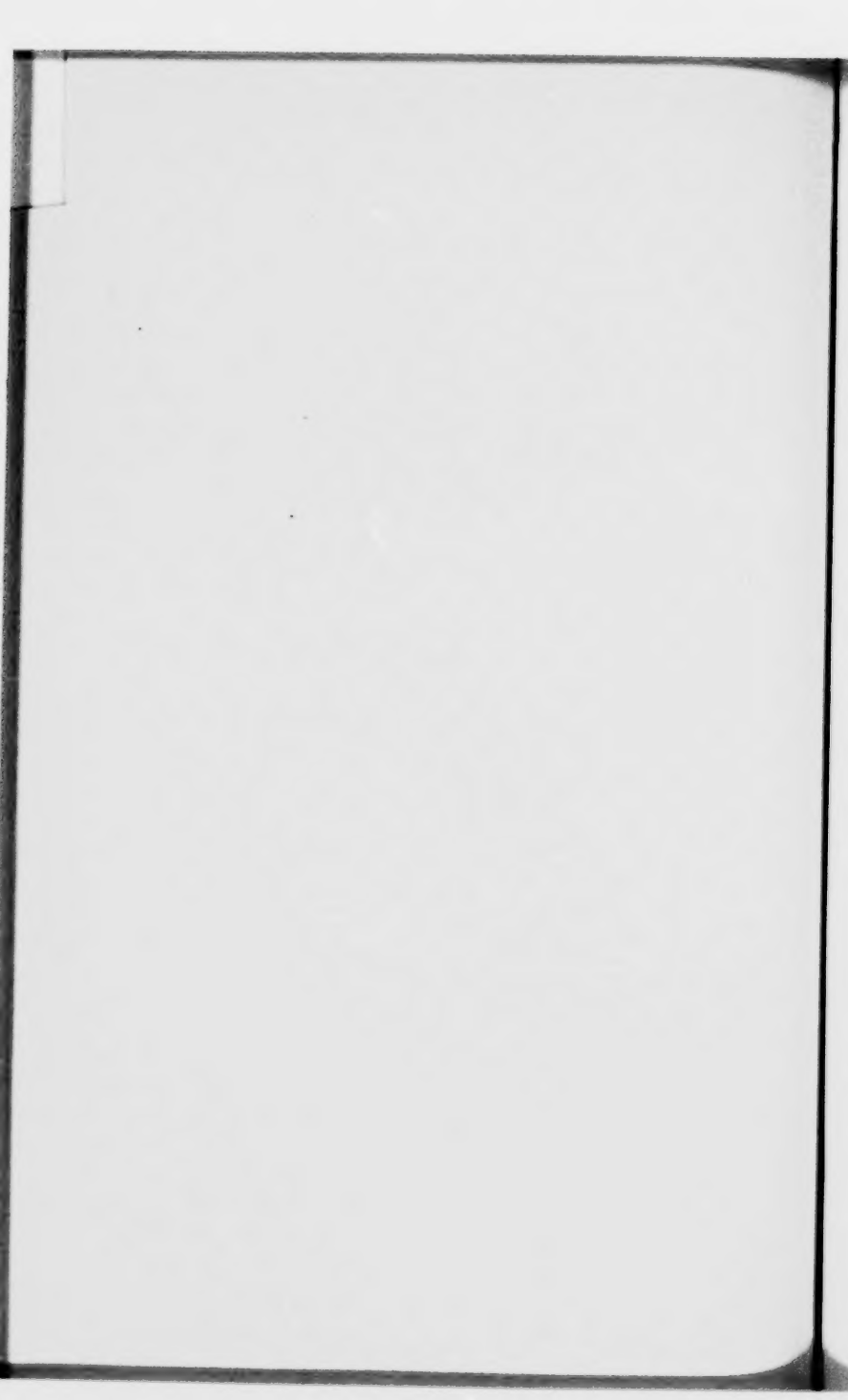
Brief for Petitioner Hyer.

ROBERT STILES,

ADDISON L. HOLLADAY,

Solicitors and Counsel

for Petitioner Hyer.



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EXPLANATORY PREFACE.

The size of this brief and the extraordinary number and length of extracts from the authorities which it contains call for explanation; but, when this is given, it is believed the Court will not only excuse but approve the paper. The brief is so arranged under headings, and so analyzed by the index, that the reader may readily turn to the discussion of that topic which for him is the point of interest or of difficulty in the cause, avoiding what he may regard as not requiring elucidation or argument.

In further explanation of the length of the brief, it should be noted that the defendants advanced not less than ten grounds of demurrer to the complainant's bill; and, while most of these seemed to us not only to lack merit, but to be destitute even of plausibility, yet it might not be prudent to assume that the Court will take this view of the matter.

But the great elaboration of the paper is due chiefly to the character of one of these grounds, which involves a question of great public interest and unusual complexity and difficulty, calling for the exercise of one of the greatest and most delicate of all the powers of a court, to-wit: the power to pronounce a contract between parties of full age and competent understanding, freely and voluntarily entered into, to be void, as contravening the public policy of a State; a power and function which several great English jurists have held to be rather legislative than judicial, and to be properly exercised by the Legislature through the medium of positive statute. Here again, we are of opinion that a plain, common-sense, *prima facie* view of the matter completely extricates the case from the tangled web of conflicting decisions on this vexed question, and stamps the contract set out in the bill as a natural, lawful and altogether proper agreement, in no way contravening the public policy of the State; yet, manifestly it would not do to

assume that this will be the view of this honorable Court, especially, since the Judges below differed as to whether or not this contract was obnoxious to this objection. We have deemed it proper, therefore, to embody in our brief somewhat of an analytical review of the authorities upon the law of public policy as affecting contracts, and that upon both branches of the subject, to-wit: first, what contracts are invalidated by the law of public policy; and second, under what circumstances courts of justice will entertain the application of one of two contracting parties to compel the other to account for and to pay over the complainant's share of the proceeds of an illegal or immoral contract.

The following, then, is the general plan of this paper. It consists of three general divisions: the *Preface*; the *Brief* proper, discussing the only two questions deemed by the lower courts to be worthy of notice; and an *Appendix* embracing a discussion, more or less brief, of the remaining eight grounds of demurrer.

The preface explains itself.

The brief proper discusses the following questions:

FIRST.

(A.) **Whether it be necessarily contrary to public policy for rival applicants for a Legislative charter or franchise to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?**

And if the above be answered in the affirmative, then—

(B.) **Whether, after a contract contrary to public policy has been consummated, and the franchise or other benefit contemplated in such contract has been secured, and one party has appropriated all the benefit, and the other seeks justice at the hands of the court and a fair division; whether, we say—under such circumstances—a court of equity and of conscience will entertain and approve the plea of the wrong-doer, that the original contract was immoral or invalid?**

SECOND.

Whether the complainant has a plain, adequate and complete remedy at law?

These questions are discussed under sub-heads, each of which is so designated and indexed that it may be readily found.

Authorities cited are so listed, indexed and spaced that any case may be read or passed at pleasure.

We do not regard the appendix as an integral part of the brief, because we do not consider any position discussed in it as having any important bearing upon the decision of the case. We, of course, understand that a court, when sustaining a demurrer upon any one ground, is not called upon to notice the remaining grounds, even though (it should be) inclined to deem them well taken. It may be proper to remark, however, that upon the argument of the cause in the Circuit Court of Appeals, the entire drift of the discussion seemed to indicate that the bench, and the counsel upon both sides, were agreed that the fate of the demurrer hung upon the Public Policy defense, or upon that and the remedy at law.

We believe this will be the view of the justices of this honorable court also, after glancing over the recital of these eight points in the index; yet, if any member of the Court shall feel desirous of looking further into any one of these points, he will find a discussion of it in the appendix, at the page indicated in the index.

The brief proper, as already stated, is taken up with the discussion of the only two grounds of demurrer to which any one of the judges who sat upon the case below in either court seemed to attach the slightest importance, to-wit: Public Policy and Remedy at Law.



IN THE
Supreme Court of the United States.

October Term, 1897.

No. 379.

L. H. HYER, PETITIONER,

VS.

RICHMOND TRACTION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opening Brief for Petitioner Hyer.

It is proper that this brief should open with a statement of the basis of fact upon which we propose to discuss the case; and, because we cannot present such basis more clearly and succinctly than was done in our petition for *certiorari* filed and acted upon the last day of the last session of this Honorable Court, we here reprint the first twelve pages of that petition, breaking the recital into headings, in order that the Court may be able to determine just where to look for what it may consider most relevant and important to the points to be passed upon.

Statement of Case.

1. Your petitioner, a citizen of the State of Missouri, by profession a civil engineer, in the early summer of 1895, secured from the City Council of the City of Richmond, Virginia, the grant to himself and associates, under the name and style of the Richmond Conduit Railway Company, of a franchise to build a street railway on Broad and connecting streets in said city.

2. This franchise, as finally passed, not being in all respects what your petitioner had asked, upon open conference with the Street Committee of said City Council he was assured that the desired amendments would be made on condition that he would deposit \$10,000.00 in one of the banks of the City of Richmond, Va., upon the terms and provisions of a paper to be prepared by the City Attorney, as a pledge of his intention and ability to build the road, which deposit your petitioner made, and, being thus assured of his charter, went North to see his financial backers and to prepare for the vigorous prosecution of his enterprise.

3. Arrived in New York, he was surprised to find one Phil. B. Sheild, an attorney at law of Richmond, Virginia, in conference with the parties, Messrs. Stewart & Co., Wall street brokers, who had undertaken to furnish the necessary capital for his (petitioner's) enterprise, said Sheild urging said brokers to back him and his associates, who were seeking to induce the City Council of Richmond, Virginia, to grant the franchise for the Broad street railway to them, under the name and style of the Richmond Traction Company, instead of to your petitioner and his associates, under the name and style of the Richmond Conduit Railway Company.

4. After some conference, by the advice of Messrs. Stewart & Co., who were to furnish capital for building the road as aforesaid, an amicable understanding and basis of co-operation was arrived at between the two parties represented respectively by your petitioner, and said Sheild, which was embodied in a contract, in the shape of a joint letter, addressed to S. H.

G. Stewart, Esq., head of the house of Stewart & Co., which letter is in the following words and figures to-wit :

Contract of August 9, 1895.

" NEW YORK, August 9th, 1895.

" S. H. G. Stewart, Esq. :

" 40 Wall Street, City.

" Dear Sir :

" We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement : That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street in the city of Richmond, Virginia, with collateral lines, have made the following agreement : That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

" It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895 ; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

" Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

" Yours very respectfully,

" (Signed) L. H. HYER.

" (Signed) PHIL. B. SHEILD."

Contract Faithfully Executed by L. H. Hyer

5. Your petitioner and his associates in good faith performed their part of this contract, and upon this basis the franchise was granted by the City Council of Richmond to the "Richmond Traction Company," it being understood with said Sheild, representing his Traction associates, that the names of your petitioner and two of his associates and of three from the Traction side were to be inserted in the franchise, as incorporators.

Contract Violated and Repudiated by Defendants.

6. Said Sheild and his Traction associates, however, utterly failed to carry out their part of said contract, and, leaving out the names of petitioner and his associates, procured the grant of the franchise contemplated in said letter of August 9th, 1895, to incorporators, all of them of the Traction side, and ultimately, when petitioner demanded an explanation, in terms repudiated the obligations of the contract, denied that the Richmond Traction Company was bound thereby, and denied any and all rights of your petitioner thereunder, or in the Traction franchise and enterprise.

Notice Given of Complainant's Rights and Bill Filed.

7. Your petitioner published the above contract of August 9, 1895, in a Richmond (Va.) newspaper before the final passage of the ordinance granting said Richmond Traction franchise to Phil. B. Sheild and others, and promptly thereafter gave, to all parties known to be interested in the Richmond Traction Company and its said franchise and enterprise, the fullest notice practicable of his rights and claims in the premises, and being met only by repeated and contemptuous denial of said rights, on the 30th day of October, 1895, he brought his bill, in the Circuit Court of the United States for the Eastern District of

Virginia, at Richmond, setting forth in fuller form the above recited facts, making an exhibit of the Traction franchise or ordinance, making parties of said Richmond Traction Company, the incorporators mentioned in said ordinance, and all other persons known to be interested in said Traction franchise and enterprise, alleging that all said parties had acted with full notice and knowledge of petitioner's rights in the premises; that he had been unjustly deprived of said rights, and would be exposed to irreparable injury unless the court should interfere by injunction to prevent said franchise, or any part thereof, from being transferred, assigned or encumbered to or in favor of innocent parties unaffected with notice of petitioner's rights. Said bill prayed such injunction; that the court would by its decree declare him entitled to a full one-half interest in and under said contract of August 9th, 1895, with said Sheild and associates, and, upon the basis of said contract, entitled to a full one-half interest in said Richmond Traction Company's franchise, enterprise, property and stock; that specific execution of said contract be decreed and enforced; that all parties defendant be required to answer and to do and perform every act necessary or requisite to the vesting of petitioner's full rights in the premises, and for general relief.

Defendants Demur

8. To this bill the defendants demurred, on the ground of insufficiency and lack of equity, and that petitioner's remedy, if any, was at law.

Amended and Supplemental Bill Filed.

9. Subsequently, by leave of court, petitioner filed his amended and supplemental bill, incorporating the original bill and reciting facts which had transpired since it was filed which rendered the amended bill necessary, to-wit: the subscription to stock, its issue to parties having notice of your petitioner's rights as paid-up stock without any payment whatever therefor, the organization of the Traction Company, the authoriza-

tion, execution and recordation of a mortgage upon its franchise and all its property to secure \$500,000 of bonds; all of which proceedings the amended bill charged to have been had and taken after full notice of petitioner's rights, as set out in his original bill, and to be, on several specified grounds, null and void as against petitioner. Said amended bill thereupon prayed for relief by injunction and the appointment of a receiver; that all proper inquiries be had and accounts taken; that, by decree of court, all said recited proceedings be declared null and void and set aside; that the franchise be disencumbered of all the burdens by said proceedings imposed upon it; and that petitioner be decreed his full rights in said disencumbered and restored franchise, and for general relief.

Defendants Again Demur.

10. To the bill as thus amended the defendants filed their demurrer, specifying nine grounds, only two of which, however, need be noticed, for the purpose of this petition, to-wit:

(A.) That there can be no recovery upon the contract relied upon by petitioner, the same being void as contrary to public policy.

(B.) That the remedy upon said contract, if any, is at law.

Bills Amended Under Decree of April 6, 1896

11. Upon the filing of said demurrer, your petitioner, not because he considered his said bills, fairly construed, to be defective, but because they contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making or carrying out of said contract of August 9, 1895, filed his petition asking leave to amend his said original and amended and supplemental bills, in the manner fully and exactly set out upon the face of said petition, so that the amended paragraphs of said bills should read as therein set out. After full argument, the honorable Circuit Court, on

the 6th of April, 1896, Judge Goff sitting, entered an order, from which the following is an extract :

"On consideration whereof, it is hereby ordered that said petition be filed, and that the complainant have leave to amend the said bills, in the particulars set out in his said petition, which is hereby done." (See page 66 of record.)

Your petitioner, however, for the sake of clearness, filed in the Clerk's Office of the Circuit Court, on the 18th day of April, 1896, a complete draft of his amended and supplemental bills, as the same read with all amendments allowed by the aforesaid order of April 6, 1896, which was thereafter designated as "complainant's second amended and supplemental bill," delivering to all defendants copies of the same; and said defendants, on May 4, 1896, filed their demurrer thereto, which was set down for argument, all of which was particularly set out in a preliminary decree entered by the Circuit Court on the 22d day of August, 1896, and the same court, Judge Nathan Goff sitting, by its final decree of August 22, 1896, declared that the cause came on to be heard "upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is to say, the amended and supplemental bill as amended by the decree herein of April 6, 1896, and in the form filed on the 18th day of April, 1896)."

The last named bill contains, among others, the following allegations and statements of facts, viz :

Extracts from Bill as Last Amended.

"Mr. Hyer agreed that the Traction ordinance should take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the City of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the City of Richmond the franchise set out in the said contract of August 9th, 1895, and your orator was to keep the \$10,000.00 in Richmond until the 17th day of August,

1895, but subject to the condition set out in the said contract."

* * * * *

"At this same interview, said Sheild asked your orator what names of his associates should be inserted in the Traction ordinance. He insisted that he must have your orator's name, and he also desired to use the names of one or two of your orator's associates whom he specified. Your orator could not, at that moment, give definite instructions, but the next day he wired his friends in Richmond, whither Sheild had returned, desiring them to see him, and to have inserted in the Traction ordinance your orator's name and the names of two of his friends and associates who were specified. For a day or two subsequent to the signing of said contract of August 9th, 1895, said Sheild and his associates several times wired your orator as to sundry details of the joint enterprise, especially urging him, by all means, to see that the \$10,000.00 on deposit in Richmond, should be detained there until the meeting of the Council—an indispensable service which your orator rendered, although not at the time having received the telegrams referred to. And not only so, but your orator and his associates openly, publicly and fully carried out and performed each, all and every of the promises and covenants of your orator, in behalf of himself and associates, contained in said contract of August 9th, 1895."

"And your orator here takes occasion to state that he applied for and obtained leave of court to amend this, his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees; not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9th, 1895."

"Your orator, here, and now, states and charges, not only that no such impression was intended to be conveyed by the bill, but that nothing approximating to it in fact, occurred. On the contrary, the entire

history of the Broad street franchise before the City Council and its committees, was a matter of the utmost publicity. The original Conduit Railway franchise of your orator, had been fully considered and discussed before the Council, and by the business community, and the proposed amendments of it were publicly offered, considered, and adopted before the Committee on Streets, and then printed; and when the Traction franchise was applied for, in place of the Conduit franchise, this also was openly done before the same committee; the existence and substance of the contract of August 9th, being generally and fully known by the Council of Richmond, and the public generally and in no way concealed or suppressed, and it being also well and thoroughly understood by the Committee on Streets, that the Conduit people and the Traction people had gotten together, upon the basis of this latter franchise, with the understanding that the two sides should have equal right and representation in the new company."

As petitioner views the matter, his bills, as last amended (page 81-98 of the record) *i. e.*, the bills upon which the cause was heard, do not contain a word which gives color to the suggestion that the contract upon which he relies, is violative of public policy. Said bills were also amended by the insertion of a direct charge of the utter insolvency of Phil. B. Sheild, which has an evident and important bearing upon the defence that petitioner has a plain, adequate, and complete remedy at law.

Defendant's Demur to Bill as Last Amended.

12. Nevertheless, substantially the same grounds of demurrer—one being added, now ten in all—were interposed to the bills in their final form (pages 114-115 of the record).

The cause was thereupon argued and submitted, pursuant to a preliminary decree, which will be found on pages 118-119 of the record, and, on the 22nd day of August, 1896, the following final decree was entered, to-wit:

Final Decree of Circuit Court

" This cause having been argued before this court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, and 15th days of May, 1896, upon the defendants' demurrer to the complainant's second amended and supplemental bill (that is to say, the amended and supplemental bill, as amended by the decree herein, of April 6th, 1896, and in the form filed on the 18th day of April, 1896), the court filed its opinion on the 5th day of August, 1896, hereby made a part of the record, holding that the first, second, and third grounds of demurrer assigned by the defendant in their said demurrer, are not well taken and must be overruled; that the fourth ground of demurrer assigned in the said demurrer is well taken and must be sustained, and that having reached the conclusion last stated, the six remaining grounds of demurrer assigned by the defendants would not be considered.

" Thereupon it is adjudged and decreed :

" First. That the first, second, and third grounds of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, to the second amended and supplemental bill filed by the complainant be, and the same are, hereby overruled.

" Second. That the fourth ground of demurrer assigned by the defendants in said demurrer filed May 4th, 1896, be and the same is hereby sustained, and all bills filed by the complainant are, for this reason, hereby dismissed, with costs to the defendant, to be taxed by the clerk : and the remaining six grounds of demurrer assigned by the defendants are not considered or determined by the court."

Appeal Allowed Assignment of Errors.

On the 6th day of October, 1896, an appeal was allowed your petitioner by said Circuit Court, from its said final decree, to the United States Circuit Court of Appeals for the Fourth Judicial Circuit, the assignment of errors therewith being as follows, caption and signature omitted, to-wit :

• "And now, on this 6th day of October, 1896, came the petitioner, L. H. Hyer, plaintiff in the above entitled suit, by Stiles & Holladay, his solicitors,

and says that the decree entered in the said cause on the 22nd day of August, 1896, dismissing all bills filed by the said L. H. Hyer in the above entitled cause, is erroneous and against the rights of the appellant, L. H. Hyer; and said petitioner, L. H. Hyer, appellant, assigns for error, and will contend, in the Appellate Court, that the court below erred as follows:

1

"First. That the court erred in sustaining the fourth ground of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, and, for the reasons assigned in said fourth ground of demurrer, dismissing all bills filed by the complainant, L. H. Hyer. The said fourth ground of demurrer assigned by the defendants in said demurrer, filed May 4th, 1896, is in the following words and figures, to-wit:

"IV. That the contract and agreement set forth in said bill as the sole cause of action of the said complainant is against public policy, and null and void; and no court of equity will enforce the same."

This 4th ground of demurrer will be found on page 115 of the record, and was not copied in the assignment of errors.

"The appellant, L. H. Hyer, respectfully submits and will contend in the Appellate Court that the contract and agreement set forth in his bills filed in this cause, and referred to in said demurrer, were and are perfectly valid and lawful in all respects; that said contract and agreement are in no manner contrary to public policy; that the court below erred in holding said contract and agreement to be contrary to public policy, and therefore null and void, and erred in declining to enforce specific performance of the said contract and agreement, and erred in dismissing the bills filed by L. H. Hyer, or either of them.

2

"Second. That the court erred in sustaining the demurrer filed by the defendants, and erred in dismissing all bills filed by the said L. H. Hyer, or either of them. The contract and agreement set out in the bills filed by the said L. H. Hyer state a plain case for relief in a court of equity; the court below should have overruled all demurrers filed by the defendants herein, and each and every ground of demurrer assigned by the defendants in their said demurrers, and should have retained jurisdiction of this suit and granted the relief prayed by the said L. H. Hyer in his said bills.

3

"Third. That the court in dismissing the bills filed by the said L. H. Hyer in this cause, or either of them, for the reasons set out in the said decree herein of August 22nd, 1896, and the opinion of the court mentioned

herein and made a part of the record; and erred in dismissing the said bills, or either of them, for any reason.

"Fourth. For these and other reasons appearing upon the record of said decree of August 22nd, 1896, your petitioner prays for an appeal from and supersedeas to said decree, and that the said decree may be reviewed and reversed."

Decree of Affirmance by Circuit Court of Appeals.

This appeal was duly perfected and prosecuted and the case was argued in the appellate court, before the Chief Justice and Judges Simonton and Brawley, and submitted at the February term, 1897; and on the 14th day of May, 1897, opinions were filed by Judges Simonton and Brawley, and the following decree of affirmance was entered by the honorable Circuit Court of Appeals:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause, be, and the same is hereby, affirmed, without prejudice, with costs.

"It is further ordered that the mandate of the court issue after the expiration of twenty days from the date hereof."

REAL GROUNDS OF DEFENCE.

Of the ten grounds of demurrer interposed by the defendants to petitioner's bills, as amended by the decree of April 6th, 1896, and in the form filed April 18th, 1896, only two were dignified by notice or mention by the honorable judges of the Circuit Court of Appeals. Of the remaining eight, several were virtually abandoned by counsel in the oral argument. Indeed, it may be said that there are but *two* real questions in the case, and that the demurrer to petitioner's bill must be overruled unless sustained upon one or other of these two grounds.

These questions are as follows :

FIRST.

(A.) Whether it be necessarily contrary to public policy for rival applicants for a Legislative charter or franchise to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?

And if the above be answered in the affirmative, then—

(B.) Whether, after a contract contrary to public policy has been consummated, and the franchise or other benefit contemplated in such contract has been secured, and one party has appropriated all the benefit, and the other seeks justice at the hands of the court and a fair division; whether, we say—under such circumstances—a court of equity and of conscience will entertain and approve the plea of the wrong-doer, that the original contract was immoral or invalid?

SECOND.

Whether the complainant has a plain, adequate and complete remedy at law?

Let us consider these questions in the order in which we have just stated them.

I.

Public Policy.

It may be well at the outset to again spread upon the face of this brief the contract under examination—that the court may have it conveniently at hand, and that the view of the eye may lead the thought of the brain.

"NEW YORK, August 9th, 1895.

"S. H. G. Stewart, Esq.,

"40 Wall Street, City.

"Dear Sir :

"We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to cooperate one with the other, in securing a franchise for said railway, and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER.

"(Signed) PHIL. B. SHEILD."

Circumstances Surrounding The Contract.

The complainant, Hyer, a citizen of Missouri, is a civil engineer; the defendant, P. B. Sheild, residing in the city of

Richmond, an attorney at law; and Stewart and Company, of New York, are Wall street bankers—S. H. G. Stewart, Esq., being the head of the firm. These three parties, acting together, possessed, in an unusual degree, the qualifications and ability requisite to construct an extensive railway system, such ability and qualification as no one, and no two, of the three, possessed. The engineer could lay out and grade the roadbed, advise as to motive power, select rails, material and equipment, and generally superintend the physical construction of the road; but he needed a lawyer to guide and instruct him in respect to the legal questions attending a matter of this magnitude and complexity, and he needed a banker to furnish or raise the money to build and equip the road, or, in the conventional phrase, to “finance the scheme.” So, also, the lawyer had need of the engineer and the banker, and the banker had need of the engineer and the lawyer.

The enterprise required the services of all these parties, *i. e.*, a banker, a civil engineer and a lawyer. Stewart and Company were to furnish the money for the enterprise, and, naturally, wished to make it a success, and to so conduct the same as to afford the best security possible for their investment. These bankers could lose nothing by having a civil engineer (and his associates) and a lawyer (and his associates) to work together as partners (to the extent set out in the contract of August 9, 1895), and the fund would be saved the expense of a lawyer by having him thus interested with the civil engineer, while no responsibility would be imposed upon Stewart and Company by such an arrangement. Nothing was more natural under these circumstances than the action of Stewart and Company in advising Hyer and Sheild to enter into the contract of August 9, 1895. It was a plain, business transaction, calculated to promote the interests of all parties. The contract embodied in the letter of August 9, 1895, was free from objection upon its face.

The general head of Public Policy, as applicable to this contract and to the facts and circumstances just above, and in the bill set out as leading up to and following the contract,

divides itself into two questions, the first of which may be thus stated :

Is it necessarily contrary to public policy for two rival applicants for a Legislative charter to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation ?

The exact relevancy of the question to the case, and the answer that must be returned to it, are equally obvious. Precisely this is what Sheild and Hyer did ; and it is not perceived how, *upon a plain, common-sense view of the matter*, the propriety or legality of their action can be called in question. The highest public policy, as Judge Brawley says, "requires that men should perform their contracts"; but if men cannot be allowed to make a contract such as this, and if, when made, they cannot be compelled to perform it, then there would seem to be an end at once to the liberty and the obligation of human contract.

We do not scruple to declare and to insist that this is the case, and the whole case, upon this branch of it. *Whatever "loose expressions" (and they were nothing more) there may have been in the bill as it stood before the last amendment, capable of being distorted into the semblance or the suggestion of wrong, they were all, after full argument, stricken bodily out; and the complainant was permitted to aver, and did aver, that the utmost candor and publicity was intended and practiced in the making and carrying out of the contract of August 9, 1895; that no impression as to the use of illegal or improper influence was intended to be conveyed, and that nothing approximating to it in fact occurred.*

When the letter above quoted is read in the light of this statement—which, upon demurrer, must be taken to be true—it may almost be said even that reasonable doubt is excluded. Nothing is left in the case, as a plausible basis for discussion, except the bugbear of "withdrawal of competition," and even this is not a plausible basis in this case, since it is left uncertain *in the contract* as to the motive power of the projected rail-

way, and whether it should be applied overhead or underground; and *in the franchise*, as subsequently granted, the city reserved the entire question of motive power, leaving it under the control of the Council, with express reservation of the right to revoke the permission to use electricity as such motive power, or to put any further conditions, restrictions and regulations upon such use. See letter to Stewart, and 5th section of Traction ordinance, page 21 of record.

Opinion of Circuit Judge Sitting in Circuit Court of Appeals.

We do not intend by the last paragraph to indicate any lack of respect for the opinion of the learned Circuit Judge, rendered on the hearing in the Circuit Court of Appeals. See record, pp. 133-141. It is noticeable, however, that his Honor, in his statement of the case, quotes from the bill as it stood prior to amendment; notwithstanding the demurrer, which was argued before him and which he sustained, was a demurrer to the bill as last amended. See order of Circuit Court, pp. 118, 119. He quotes and bases his opinion upon expressions and features which do not exist in the bill as last amended, being amongst the "loose expressions" which the complainant, by his petition filed April 6, 1896, and the orders of the Circuit Court entered thereupon, asked and obtained leave to strike out—*e. g.*, the amended bill does not contain the statement that complainant was satisfied he had the "inside track" and was "master of the situation"; nor that "the antagonism would probably result in the defeat of both competitors; or that before the franchise was obtained it would be loaded with such onerous and exacting conditions, that no capitalist could be induced to put money in the enterprise."

The expressions quoted are not only not in the bill as last amended, but the amendments, which struck them out and substituted other phraseology, were made with unusual care and formality—a regular petition for leave to amend being filed, which petition set out in detail the amendments which

were asked to be made and recited the paragraphs which were asked to be amended in the form in which they would exist after amendment, if leave to amend were granted—pp. 66 *et seq.* Not only so, but the order of April 6, 1896, filing the petition and allowing the amendments therein asked, was entered after elaborate argument; and, for the sake of clearness and accuracy, the complainant subsequently filed, in the clerk's office of the Circuit Court on the 18th day of April, 1896, a complete draft of his amended and supplemental bill, as the same read after the amendments granted by the aforesaid order were made—pp. 81 *et seq.* It was to this bill that the defendants demurred, and this is the demurrer which was argued both in the Circuit Court and Circuit Court of Appeals. See order of Circuit Court, pp. 118, 119.

The opinion of the learned circuit judge, sitting upon appeal, makes these quotations from the original bill as it stood prior to amendment, two of them marked by him as quotations (taken from the last clause of paragraph IV, page 4, printed record), and the third taken from paragraph V of the bill, page 5, printed record, as originally filed. Compare the last clause of paragraph IV, page 4, printed record, and paragraph V, pages 5 and 6, printed record, with the same paragraphs as re-written in the petition asking leave to amend at pages 68, 69, and 70, printed record, under the heads of paragraphs IV and V. See, also, the complainant's bill, as last amended, pages 85 and 86, printed record, paragraphs IV and V—*i. e.*, in the form reprinted and again filed April 18, 1896. Stated in brief, the quotations were stricken from the original bill by leave of the trial court. They do not appear in the bill upon which the cause was heard and determined by the Circuit Court.

That part of the decree of the Circuit Court of April 6, 1896, page 66, printed record, bearing upon the subject of amendments to the bill, is in the following words—viz:

"This cause came on this day to be heard on the petition of L. H. Hyer, complainant herein, this day tendered, asking for leave to amend the original, the amended and supplemental bills heretofore filed in this cause; and

was argued by counsel, the plaintiff being represented by Stiles & Holladay, and the defendants by W. W. Henry and James Lyons; on consideration whereof it is ordered that said petition be filed, and that the complainant have leave to amend the said bills in the particulars set out in his said petition, which is hereby done."

The preparatory decree, pages 118 and 119, printed record, immediately preceding the final decree, set out explicitly and in detail the manner in which the complainant's bill had been amended, how the cause stood upon the hearing, and the particular pleading upon which it was submitted to the Circuit Court for decision.

The final decree itself, pages 119 and 120, printed record, also (out of abundant caution) contained the following statement in regard to the pleading, upon which the Circuit Court rendered its decree—viz:

"This cause having been argued before this Court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 15th days of May, 1896, upon the defendant's demurrer to the complainant's second amended and supplemental bill (that is to say, the amended and supplemental bill as amended by the decree herein of April 6th, 1896, and in the form filed on the 18th day of April, 1896), the Court filed its opinion on the 5th day of August, 1896, hereby made a part of the record holding that the first, second and third grounds of demurrer assigned by the defendant in their said demurrer are not well taken, and must be over-ruled; that the fourth ground of demurrer assigned in said demurrer is well taken and must be sustained, and that having reached the conclusion last stated, the six remaining grounds of demurrer assigned by the defendants would not be considered."

It seems therefore that the learned circuit judge sitting in the Circuit Court of Appeals rested his opinion, certainly in part, upon the allegations of the original bill prior to amendment; that he reached his conclusion against the validity of the contract of August 9, 1895, by taking into consideration certain loose and careless expressions contained in the complainant's original bill, notwithstanding the fact that these loose and careless expressions had been absolutely stricken therefrom by leave of the trial court, after full argument touching the right of the complainant to amend and state the case he expected to prove; that he reached his conclusion upon

consideration of defendants' demurrer to the original bill notwithstanding its amendment, while the trial court declared it heard and determined the cause upon the defendants' demurrer to the complainant's bill as it stood, as last amended, as contradistinguished from the bill as it stood prior to amendment.

It is fair to assume that the views of the learned circuit judge, sitting upon appeal, were based largely upon these quotations ~~and extract~~, and that he would not have regarded the contract of August 9, 1895, as invalid had he discarded these from his mind and considered the cause upon the defendants' demurrer to the bill as last amended. He laid down a statement of the case upon which he rested his opinion. He based his conclusions upon that statement. That statement, we humbly submit, did not accurately follow the pleadings upon which the complainant's case was heard and determined by the trial court.

In a word, the learned Judge of the Circuit Court, sitting on appeal, practically and substantially over-ruled the decrees of the lower court allowing amendment of the bill, and, after having so over-ruled the decrees of the trial court in this regard, went back to the bill as originally filed by the complainant and rested his opinion upon a demurrer to that bill as contradistinguished from the bill as last amended.

The fact that the learned circuit judge quoted from the original bill and based his opinion, in part at least, upon statements which had been stricken therefrom by leave of the trial court, indicates that he did not rest his opinion upon the defendants' demurrer to the bill as last amended; that he did not declare upon demurrer (and as a legal question) that the complainant had not stated a case in his bill, *as last amended*, which entitled him to recover if the facts therein stated could be established by proof at a hearing on the merits.

As to that portion of the opinion of the learned circuit judge, which treats of the arrangement between Hyer and Sheild as tending to lessen or withdraw competition, in which the public was interested, we are content to rest the matter upon a comparison of the opinion of the learned circuit judge

with that of the able district judge, pages 142 to 145, printed record, and the discussion of this point, and the authorities cited upon it later in our brief.

Opinion of District Judge Sitting in Circuit Court of Appeals.

Upon the question whether the contract between Sheild and Hyer is one of the class of contracts ordinarily condemned and annulled by the courts as violative of public policy, the learned District Judge, in his opinion, says:

" * * * Hyer and Sheild were rival promoters, each seeking from the City Council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise.

" Hyer had already obtained a franchise from the Council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they united in an agreement for mutual co-operation and for an equal division of whatever profits were realized. The agreement does not on its face bear any of the *indicia* which mark a dishonest purpose. It does not show, nor can it be reasonably inferred, that any sinister, extraneous or corrupting influences were to be brought to bear upon the City Council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise."

Upon the question whether the coming together of Sheild and Hyer and their agreement to ask the grant of the fran-

chise to them jointly, was calculated to lessen competition for said franchise, to the disadvantage of the public and of the city of Richmond, the learned District Judge further says:

"It is not contended, nor can it be assumed, that Hyer or Sheild, either or both, had such control or monopoly of the building of street railways that they could by combination put up the price or demand an unusual or unreasonable franchise or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or non-action. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right."

"The franchise in question was not a thing that was put up at public auction and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The City Council of Richmond, faithful, as it must be assumed, to its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an object which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and to hold a contract void because its tendency may be to defeat competition, it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfillment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint co-operation, and they voluntarily combine in furtherance of the enterprise, there can be no objection to it if it is done honestly and in good faith. Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish

the desired end, it should be sustained. 'If there is one thing,' says Sir George Jessel in a recent case, 'which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.'

"All presumptions are in favor of the legality of contracts—all reasonable intendments are indulged to support them—if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion can be drawn from them, for intention to violate the law is not to be presumed."

The above extracts from the opinion of the learned District Judge suggest, and the suggestion, as we shall show, is abundantly borne out by the authorities—that the fundamental principles, in the light of which this question must be examined and determined, are the following, to-wit:

FIRST. The broadest public policy is in favor of the liberty of contract.

SECOND. The strongest presumption is in favor of the validity of contract, and therefore,

THIRD. The greatest indisposition exists on the part of the courts, to hold a contract void as against public policy, upon demurrer; and this will be done only in the clearest possible case.

FOURTH. Contracts tending to the withdrawal of competition, are not necessarily invalid as against public policy, but each case must be examined and determined in the light of its peculiar circumstances.

The following are some of the principal authorities which, in order to avoid excessive subdivision, we have thrown together in two or three groups, and first:

**Presumption in favor of the Validity of Contracts
Assailed as Contrary to Public Policy.**

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<i>Registering Company vs. Sampson, L. R., &c.</i> , 19 Eq. Cases, 462-5. - - - - -	25
<i>Richardson vs. Mellish</i> , 2 Bing., 229. - - - - -	25
<i>Lewis vs. Davison</i> , 4 M. & W. Exchq., 653. - - - - -	28
<i>Barton vs. Muir</i> , 31 L. T. N. S., 593. - - - - -	29
<i>Walsh vs. Fussell</i> , 6 Bing., 163 (19 Eng. C. L., 83). - - - - -	29
<i>Aubin vs. Holt</i> , 2 K. & Johns., 68. - - - - -	31
<i>Sessions vs. Dixon</i> , 5 B. & C., 758. - - - - -	
<i>Bennett vs. Clough</i> , 1 Barn. & Ald., 461. - - - - -	
<i>Gale vs. Leckie</i> , 2 Starkie, 107. - - - - -	
<i>Tallis vs. Tallis</i> , 1 El. & Bl., 391. - - - - -	
<i>Rousillon vs. Rousillon</i> , 14 Ch. Div., 351. - - - - -	
<i>Hobbs vs. McLean</i> , 117 U. S., 567-76. - - - - -	31
<i>Swan vs. Swan</i> , 21 Fed. Rep., 299-301. - - - - -	30
<i>Hartford Fire Insurance Co. vs. Chicago, &c., Railway Co.</i> , 70 Fed. R., 201-9. - - - - -	30
<i>Bell & Mann vs. Dozier</i> , 24 Grat., 16 (Va.) - - - - -	31
<i>Lorillard vs. Clyde</i> , 89 N. Y., 384. - - - - -	31
<i>McBratney vs. Chandler</i> , 22 Kan., 692. - - - - -	31
<i>Kansas Pacific Railway Co. vs. McCoy</i> , 8 Kansas, 546. - - - - -	31
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<i>Bibbs vs. Miller</i> , 11 Bush (Ky.), 306. - - - - -	32
<i>Barrett vs. Carden</i> , 36 Am. State Rep., 876 (65 Ver- mont, 431). - - - - -	33
<i>Souhegan National Bank vs. Wallace's Admr.</i> , 61 N. H., 26. - - - - -	34
<i>Kellog vs. Larkin</i> , 3 Pinney, 136 (Wis.) - - - - -	34

L. R. 19 Eq. Cas. 462.

Subject: Presumption in favor of Validity of Contract.

In *Printing and Numerical Registering Company v. Sampson*, L. R. 19 Equity Cases 462, Sir George Jessel M. R. at page 465 said: * * * * *

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime or a contract to give a reward to another to commit a crime is necessarily void. The decisions have gone further, and contracts to commit an immoral offense or to give money or reward to another to commit an immoral offense, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply, but I should be sorry to extend it much further. * *"

2 Bing., 229.

Subject: Presumption in favor of Validity of Contract.

Richardson v. Mellish, 2 Bing., 227 (9 E. C. L., 391). Contract to exchange commanders of East India Company's ships: defendant repudiating the contract, plaintiff sued in assumpsit for breach. Illegality of contract being raised in defense, the Court held contract legal, all the judges (Best, C. J., Park and Burrough, Js.) concurring.

On page 397 (9 E. C. L.) Best, C. J., said :

" This brings me to the third question, whether there is any illegality in the transaction. I agree with the argument put to us, that if the defendant has clearly and satisfactorily made out by evidence a fraud in this case, or if it appears by the record in this case that this is a corrupt agreement, or that this agreement is manifestly in contravention of public policy,—whatever we may say as to the raising this objection, the objection must prevail. I am of opinion he makes out neither: I am of this opinion, giving the fullest effect to the argument urged. When I come to consider the record, I see not the least pretence for this objection. It is said it is a fraud on the East India Company, and that it is a fraud on the co-owners. It cannot be a fraud on the East India Company, for they are apprised of the whole transaction. * * * *

" We have heard much of this being a contravention of public policy, and that on that ground it cannot be supported. I am not much disposed to yield to arguments of public policy. I think the Court of Westminster Hall (speaking with deference as an humble individual like myself, ought to speak of the judgments of those who have gone before me), have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes to decide doubtful questions of policy: and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering:—if once you bring it to that, the plaintiff is entitled to recover; and let that doubtful question of policy be settled by that high tribunal, namely the Legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles. I admit, that if it be clearly put upon the contravention of public policy, the

plaintiff cannot succeed : but it must be unquestionable,—there must be no doubt :— * * * *

And on page 400, this distinguished jurist, (Best C. J.), speaking of the decisions in *Blachford vs. Preston*, and *Card vs. Hope*, especially the latter, said : * * * *

“There are expressions used by the Chief Justice in that case which seem to bear on the present : but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing is not the thing : it is the principle he is deciding. If ever I could have imagined it could have been extended to such a case as this, I would have protested against, though I could not have prevented the decision. I would in my place have protested against it, for I should have seen the injustice and confusion to which such a doctrine would have been liable to be extended. * * * *

And on page 403, Burrough, J., said : “* * * I, for one, protest, as my Lord has done, against arguing too strongly upon public policy : it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail. * * *

“As to the point of public policy, a great deal has been said, many cases have been mentioned, and in *Blachford vs. Preston*, a great number of general phrases were made use of by the learned judge. But you ought not to govern courts of justice by general expressions used in the administration of the law. They may have some weight, but they ought not to govern : you must look to what the point of decision was. I only need read the point of decision from the digest of the case, which puts it out of question that it has anything to do with this case. The Digest says, 1 Moore Dig. 361, “A sale (by the owner) of the command of a ship employed in the East India Company’s service, without the knowledge and against the by-laws of the company, is illegal : and the contract of sale cannot be the foundation of an action. * * * *

4 M. & W. (Exch.) 653.

Subject : Presumption in favor of Validity of Contract.

In the case of *Lewis vs. Davison*, 4 M. & W. (Exchequer), 653, opinions were delivered by three of the Judges. They are as follows :

“ Lord Abinger, C. B.—I fully assent to the general proposition which has been urged, that an agreement to do an unlawful act cannot be supported in law. But it does not appear to me that that is necessarily the effect of the agreement in the present case ; and when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act, the contrary is the proper inference. Here the contract is in the alternative ; either James Davison is to be surrendered to the custody of the sheriff, or the defendant is to pay the amount of the notes. It must be presumed that James Davison was to be arrested by lawful means only ; if the defendant cannot cause that to be done, he is himself to pay the money secured by the notes. The contract, therefore, is not necessarily unlawful, and cannot receive such a construction.”

“ Parke, B.—I am of the same opinion, that this declaration is sufficient. The case of *Allen v. Rescous* is wholly different ; that was the case of a contract to beat another, which was plainly unlawful. Here the defendant has in effect undertaken to induce James Davison to consent to his being arrested,—which implies that he will obtain his consent by lawful means,—or in default of his surrendering him, has made himself responsible on the notes. There is nothing necessarily unlawful in such an agreement.”

“ Alderson, B.—I also think that this contract is not necessarily unlawful. It may well bear the construction, that the defendant will arrest James Davison for a debt due to himself, and thus enable the sheriff to detain him for the debt due to

the plaintiff. And if it will bear a legal construction, that should certainly be put upon it."

31 L. T. N. S. 593

Subject: Presumption in favor of Validity of Contract.

In *Barton v. Muir*, 31 L. T. N. S. 593, the syllabus is as follows:

"In order to deprive a plaintiff of his right to relief in equity on the ground of illegality in the transaction in respect of which such relief is sought, there must be such a degree of illegality as is free from all doubt.

"In a case in which the appellant sought to have it declared that the respondent held certain lands, which the appellant had purchased in his name, as trustee from him, but his bill was dismissed on the ground that the agreement between the parties was 'a fraud in effect on,' 'contrary to the policy of' and 'by necessary implication expressly prohibited by' a colonial statute relating to the alienation of land:

"Held (reversing the judgment of the Court below) that a constructive prohibition was not sufficient in order to annul such a transaction, but that there must be no doubt whatever as to the construction and effect of the statute in question."

6 Bing., 163.

Subject: Presumption in favor of Validity of Contract.

In *Walsh v. Fussell*, 6 Bing. 163 (19 E. C. L. 40), Lord Chief Justice Tyndall (pronounced by the British House of Lords in the great Nordenfeld case, to be one of the greatest and soundest judges that ever sat upon the English bench, especially in cases of this general character) in delivering his opinion, said:

"* * * * * It is not contended that the covenant was illegal on the ground of the breach of any direct rule of law,

or the direct violation of any statute; and we think to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public. * * * *

21 Fed. R. 299—301.

Subject: Presumption in favor of Validity of Contract.

In *Sirann v. Sirann* 21 Fed. R. 299-301 the contract under construction was objected to on the ground that it was contrary to public policy as entered into on the Lord's day. The Court overruled the defense and in so doing (on page 301) said:

"* * * No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this State, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the State, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must appeal to determine the public policy of a State. The term, as it is often popularly used and defined, makes it an unknown and variable quantity,—much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a State on any given subject are its constitution, laws, and judicial decisions. The public policy of a State of which courts take notice, and to which they give effect, must be deduced from these sources."

70 Fed. R. 201.

Subject: Presumption in favor of Validity of Contract.

In the case of *Hartford Fire Insurance Co. et al. v. Chicago M. & St. P. Ry. Co.* decided by the Circuit Court of Appeals

for the Eighth Circuit, October 7th, 1895, reported in 70 Fed. Reporter 201-209, Sanborn Circuit Judge on page 207, said :

" The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. U. S. v. Trans Missouri Freight Association, 7 C. C. A. 15, 82, 58 Fed. 58; Printing & Registering Co. v. Sampson L. R. 19 Eq. 462; Tallis v. Tallis 1 El. & Bl. 391; Rousillon v. Rousillon, 14 Ch. Div. 351, 365; Stewart v. Transportation Co. 17 Minn. 372, 391 (Gil 348); Marsh v. Russel, 66 N. Y. 288; Phippen v. Stickney, 3 Mete. (Mass) 384, 389. * * * * *

22 Kans., 692; 8 Kans., 542 6; 2 Kay & Johns., 68; 24 Gratt., 16; 26 Iowa, 191; 117 U. S. 376; 89 N. Y., 384.

Subject: Presumption in favor of Validity of Contract.

McBratney vs. Chandler, 22 Kans., 692-3, holds: " There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having entered into, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is matter of defence." His Honor, Judge Brewer, who decided this case, so ruled, not only with regard to a contract for procuring legislation, but, in 8 Kansas, 542-546, with regard to a contract providing for the use of money in procuring legislation; and also in this 22 Kansas case, that if there was any evidence tending toward the validity of the contract, the case must not go off on demurrer, but be left with the jury. See, also, *Aubin vs. Holt*, 2 Kay & Johns, 68, holding that a contract only savoring of illegality, must be specifically enforced; *Bell & Mann vs. Dozier*, 24 Gratt., 16, that to make a contract contrary to public policy, it must be directly and plainly so; *Richmond vs. Dubuque & S. C. Ry. Co.*, 26 Iowa, 191-202: " The power of courts to declare contracts void, as being against public policy, is a delicate and unde-

finer one, and like the power to declare a statute unconstitutional, should be exercised only in a case free from doubt." *Hobbs vs. McLean*, 117 U. S., and *Lorillard vs. Clyde*, 89 N. Y., 384; that "Where a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted." "An agreement will not be assumed to be illegal, when it is capable of a construction which will uphold and make it valid."

It is noticeable that the case of *Hobbs vs. McLean* cites with approval *Lorillard vs. Clyde* as authority for the position just stated, in which connection the following extract, from the opinion in *Lorillard vs. Clyde*, is most pertinent and suggestive: "I can see no objection, on the score of public policy, to an agreement between parties about to form a corporation, agreeing upon the general plan, upon which it is to be organized and conducted, so long as nothing is provided for inconsistent with the provisions of the statute, or immoral in itself. An agreement providing for the details of management made in advance, might not be binding upon the trustees of the corporation when organized, but such an agreement is not illegal. In this case, as the complaint shows, the agreement upon which the guarantee was predicated, has been carried out. Wm. P. Clyde & Co. have had the management of the corporate business. There has been no failure of consideration for their promise. On demurrer, all reasonable intendments are indulged, in support of the pleading demurred to"—page 389.

11 Bush (Ky.), 306.

Subject: Presumption in favor of Validity of Contract.

In *Bibb vs. Miller, &c.*, 11 Bush (Ky.), 306, the first two paragraphs of the syllabus are as follows:

"1. *In pari delicto*.—It is the benefit of the public, and not the advantage of the defendant to an action, that is to be considered in cases in which one or more of several parties *in pari delicto* rely for defense upon the illegality of the transaction out of which the claim arises.

"2. *In such cases the presumption is in favor of the transaction, and if it be susceptible of two meanings, the one legal and the other not, that interpretation will be put upon it which will support and give it operation.* (2 Chitty on Contracts, page 977, 6 Q. B., 989; 4 M. & W., 654)."

65 Vt., 431.

Subject: Presumption in favor of Validity of Contract.

Barrett vs. Carden, 36 Am. St. R., 876 (65 Vermont, 431).
Action of debt upon a bond not to contest a will. Contract held not invalid.

Start, J., in delivering the opinion of the Court, pages 877-8, said: "The defendant insists that the alleged undertaking of the defendant is contrary to public policy, and that for this reason the bond should be declared void. Courts will not declare contracts void on grounds of public policy except in cases free from doubt, and prejudice to the public interest must clearly appear before the Court is justified in pronouncing an instrument void on this account. In *Richmond vs. Dubuque, etc., R. R. Co.*, 26 Iowa, 191, it is said 'that the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' In *Kellog vs. Larkin*, 3 Pinn., 123, 56 Am. Dec., 164, Howe, J., said: 'He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the State.' In *Richardson vs. Mellish*, 2 Bing., 229, 9 Eng. Com. L., 557, Sir James Burrough said: 'I protest, as my Lord has done, against urging too strongly upon public policy: it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never urged at all, but when other points fail.' * * *

61 N. H. 26.

Subject: Presumption in favor of Validity of Contract.

In *Southegan National Bank v. Wallace*, *Adm'r*, 61 N. H., on page 26, the Court said:

"The presumption of law is in favor of contracts; illegality will not be presumed, and if a contract is susceptible of two meanings, one legal and the other illegal, it is elementary that courts will adopt the former and not the latter, so that, if practicable, the contract may be rendered operative. Hence, if an agreement like the one here is entered into for the performance of an act which may be effected by lawful or unlawful means, the law will presume that the former was contemplated by the parties, and that what was done under it was legally done, until the contrary appears."

3 Pinney (Wis.), 136.

Subject: Presumption in favor of Validity of Contract.

In the case of *Kellogg v. Larkin*, 3 Pinney, 123, the Supreme Court of Wisconsin, speaking through Howe, J., at p. 136-7:

"I by no means intend to deny the right or the propriety of judicially determining, that a contract which *is* actually at war with any established interest of society is void, however individuals may suffer thereby, because the interest of individuals must be subservient to the public welfare. But I insist that before a court should determine a contract which has been made in good faith, stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of the State, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. And I submit that he is the safest magistrate who is more watchful over the rights of the individual, than over the convenience of

the public, as that is the best government which guards more vigilantly the freedom of the subject, than the rights of the State."

And now, in the light of the authorities, applying the principles adduced from them and distinguishing the contract under construction in this case from the various classes of contracts which have been held void by the courts as violative of public policy, we submit that

The Contract of August 9th, 1895, as Set Forth in Complainant's Bills as Last Amended, is not Contrary to Public Policy.

The general rule, which invalidates contracts violative of sound public policy, is familiar and requires no more definite statement—indeed it may be said to admit of none. It is, however, in practice a question of limitations and applicability. It is both impossible and unnecessary to cite and to discuss the almost numberless authorities bearing upon this question.

A very general analysis and classification will eliminate most of them, as not calculated to shed any light upon the question of the validity or invalidity of the contract under discussion—e. g. :

Class 1st. Cases reeking and putrid with corruption, such as the *Oscanyan* case, 103 U. S., 261, where one officer of a government, confessedly for pay, used his personal influence with another to control his decision of a public matter of vital interest to the common government; or the case of *R. & D. Extension Company vs. The Woodstock Iron Company*, 129 U. S., 642, where a fiduciary officer used \$100,000 of the funds of one company to benefit another in which he was interested.

Class 2d. Cases involving action not quite so rank with moral taint, yet such as every right-minded man would naturally shrink from, such as securing public office for another or retiring from competitive candidacy therefor—for pay or

upon condition of sharing the fees and emoluments; *Meguire vs. Corvine*, 101 U. S., 108; or securing public contracts for parties upon the like terms; *Tool Co. vs. Norris*, 2 Wall., 45.

Class 3d. Cases of express bargain for "lobby services" to influence legislation, such as the *Baltimore & Ohio* case, 16 Howard, 325.

Class 4th. Cases of agency to secure or affect legislation, with compensation contingent upon success; most of the authorities employ the expression "high contingent compensation;" see *B. & O.* case and many others.

Class 5th. Cases bargaining, for compensation, for the withdrawal of competition in which the public is interested.

IT IS CERTAINLY safe to say that our case does not fall under either the 1st, 2d, or 3d class. Being anxious to assume nothing, we will, for the present, reserve the question as to locating it within the 4th or 5th class.

Another and somewhat parallel line of classification, of contracts for services concerning legislation, which may tend further to elucidate this matter, is the collation of such features of these contracts, as the Courts have held influential, if not determinative, as to their validity—*e. g.*

1. Access to legislative bodies, in advocacy of proposed legislation, is most freely accorded to parties originally and personally interested for or against such legislation; but, is also allowed to parties interested, for compensation only, provided their character as hired agents is made known. *Marshall vs. B. & O. R. R.*, 16 How., 335.

2. Contracts contemplating open advocacy and discussion before legislative bodies and committees are usually held valid; those contemplating private approach to, or the exercise of personal influence upon individual legislators, void.

Upon this ground, contracts for services as counsel have

been generally approved and validated, those for "lobby services" disapproved and held void.

3. Contracts contemplating the use of money, in legitimate expenses such as procuring information, printing, &c., are held valid—for purposes of bribery, direct or indirect, *e. g.*, treating, suppers, any sort of entertainment of legislators, void.

IN THE LIGHT of these principles, in support of which, if need be, abundant authority might be cited, it is clear that the case at bar does not fall within *Class 4th* above described. The contract of August 9th, 1895, provides for no contingent compensation—indeed, properly speaking, it does not provide for any compensation at all.

It is a misuse of language, to speak of "contingent compensation" to a man who simply proposes and presses his own case or project, with the chance of failure or success, which every man must encounter in every enterprise he undertakes.

We might perhaps safely have assumed thus much, for no serious effort was made in oral argument, in the lower courts, to assimilate the case at bar to any class of contracts reprobated or held void as violative of sound public policy, save and except the 5th and last class—*viz.*, contracts providing for *the withdrawal of competition in which the public has an interest and by which it is likely to be benefited*. We are confident, however, that our contract does not fall even within this class; and for the following reasons:

(a) The principle is applied most freely to biddings for property at public sale.

(b) It is not applicable even there, unless the motive and purpose are impure or immoral—*i. e.*, where the intent of the contract is to lessen competition, in order to effect a purchase of property at an inadequate price.

(c) It is impossible to conceive of such an agreement being made or carried into execution as affecting either legislation

or bids for property, where, as in the case at bar, there is a free exposition of the entire scheme and exposure of the contract itself before the persons conducting the sale or composing the legislature.

(d) Lastly, there was, and there could have been, no such withdrawal of competition, to the detriment of the public, in this case: for, whatever inferences may be legitimate upon demurrer, as to the character of the "Conduit" franchise (either the original or the amended one) with reference to the power to be used or the mode and place of its application, underground or overhead; certainly, as to the "Traction" franchise, the City Council held the decision of the entire matter in their own hands. See paragraph "Fifth" of the latter franchise, top of page 30 of the bill.

The *legal presumption*, as we have seen, is in favor of the *validity of contracts*. Not only does such presumption exist, but it is so strong that, if two constructions of a contract be possible, by one of which it will be thus avoided, and by the other it may stand, that construction must be put upon it which will make it valid.

Is it too much to say, that under this state of the law, and upon this entire case, it is clear that the contract under discussion—providing simply that two sets of applicants for a franchise should unite to form one Company, going openly before the City Council and its committees, there producing their contract and their proposed franchise, explaining and exploiting their entire plan and arrangement, telling their story and making their arguments—is it not clear we say, that such a contract is not, and cannot be void as contrary to public policy?

In the lower Courts, counsel for the defendants laid down as the basis of their defense under "Public Policy," a quotation from *Pomeroy's Equity Jur.*, Sec. 945. The quotation is in the following words:

"Where a private statute or a statute directly affecting private rights, is pending before the Legislature, a secret agreement between parties interested, which if disclosed, might have determined the action of the Legislature, as, for example, an agreement by one party to withdraw his opposition in consideration of a compensation to be paid by the other, has been held a fraud upon legislation, and therefore void. The doctrine finds its most important application in dealing in contracts for the purpose of procuring legislation. All agreements, in every possible form, for the purpose of securing or using personal and private influence with members of a Legislature, or of securing or using labor and services with legislators privately, personally and individually, for the object of obtaining legislation, either public or private, are in the highest degree contrary to the fundamental theory of free legislative action."

It is interesting to note the number of limitations or qualifications embodied in this short paragraph, *e. g.*, the reprobated agreement must be "secret"—it must be such as "if disclosed, might have determined the action of the Legislature"—if an agreement by one party to withdraw opposition, it must be "in consideration of a compensation to be paid by the other"—if a contract for the purpose of securing legislation, it must provide for "securing or using private and personal influence with members of the Legislature," or, "labor and services with legislators privately, personally, and individually." Your honors will observe that no one of these limiting or qualifying features, which seem to be essentially characteristic of contracts held invalid as contravening public policy, characterizes the contract in the case at bar. It is also a noticeable feature of the utterances of Courts and text writers upon this subject, that clauses of condemnation apparently very comprehensive and sweeping, are frequently narrowed and limited by the context, *e. g.*, in the above paragraph, the statement of the author is not condemnatory, as might upon careless reading first appear, of "all contracts in every possible shape, for the purpose of procuring legislation," but only of such as are "for the purpose of securing or using private and personal influence with members of a Legislature," or, "labor and services with legislators, privately, personally and individually."

It may serve further to emphasize these and kindred points, to make a few quotations from :

Decisions Sustaining Contracts Assailed as Against Public Policy.

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<i>Simpson v. Lord Horden</i> , 37 E. C. L., 249 S. C., on,	
<i>Appeal to House of Lords</i> , 9 Clark & Fin, 61.	

140 N. Y. 382.

Subject: Decision sustaining Contract assailed as against public policy.

In the case of *Katherine F. Chesebrough, as Administrator, etc., Respondent, v. Daniel D. Conover, Appellant*, 140 New York, 382, an action was brought to recover for services rendered by Julius F. Chesebrough, plaintiff's intestate, under a contract with defendant. The decision of the trial court was in favor of the plaintiff, which was affirmed by the intermediate Appellate Court. The case was then taken by the defendant to the Court of Appeals of New York, and the latter court, in affirming the rulings of the lower courts (pages 385, 386, 387), said:

“It appears from the complaint in this action that prior to 1879 the defendant had become interested in the construction of a railroad through 42d street, in the City of New York, and that Mr. Chesebrough, who may be spoken of as the plaintiff, had rendered for him various services in and about

the proposed road, and he alleges in the complaint that on the 7th day of March, 1879, the defendant agreed with him that if he would assist him in obtaining the rights, privileges and franchise, and authority for the building of the proposed road, and draw for him certain papers, acts and resolutions to be presented to parties, to the Legislature and the Common Council, and write certain letters and see certain parties, and go to Albany and use arguments, he would give plaintiff, as soon as said extension of said railroad through 42d street was in operation, \$10,000 of the bonds and \$10,000 of the capital stock of the Company for the services to be rendered and the services already rendered by him; that, at the request of the defendant, he drew certain proposed acts to authorize the construction and operation of the railroad through 42d street, and also drew various other proposed acts of the Legislature and other papers, and rendered certain other services mentioned in the performance of the contract alleged, for all of which services he demands judgment for \$10,000 damages. The defendant, by his answer, put in issue the material allegations of the complaint as to the contract and the services claimed to have been rendered in pursuance thereof. Upon the trial, the plaintiff gave evidence tending to prove the contract and the rendition of the services as alleged. There the defendant claimed that the services consisted, in part at least, of personal and private interviews with members of the Legislature for the purpose of affecting pending legislation in the interest of the defendant, and that, therefore, the contract was against public policy and void, and that the defendant could not recover for the services; and upon his request the trial judge charged the jury as follows:

"That even if the jury find as a fact that there was a contract between the plaintiff and defendant, but that it was part of such contract that the plaintiff, if requested, would go to Albany and see some member of the railway committee when one of the bills testified to was before such committee, and talk to him privately to further said bill so as to have the bill reported and passed along, or so that the bill could be passed, and that the plaintiff did talk with one or more members of such committee privately for such purpose, then the defendant is entitled to a verdict.

"That even if the jury find as a fact that there was a contract between the plaintiff and defendant, but that it was part of such contract that the plaintiff should, if requested, have personal and private interviews with members of the Legislature, having in view as one of their objects the furthering of any bill pending in the Legislature, or a committee thereof, so that the same could be reported by such committee and passed, then the jury need consider no other question, but must render a verdict for the defendant."

"Notwithstanding the instructions thus given to the jury, they found a verdict in favor of the plaintiff; and it is now claimed by the learned counsel for the defendant that upon the undisputed evidence the verdict should have been in favor of his client."

"It is conceded by both parties that the judge properly instructed the jury, but they differ as to the force and effect of the evidence. It is not to be denied that upon the evidence the case was a very strong one for the defendant, and that the jury, with the power to weigh the evidence and draw inferences therefrom, could, under the instructions given, have found a verdict in his favor. But we think the jury could take a different view of the evidence, and find that the contract between the parties was not condemned by the rules of law, and that no services were rendered by the plaintiff in violation of the public policy embodied in the instructions given by the judge to the jury. If the plaintiff was employed to render what are commonly called lobby services in procuring the legislation desired by the defendant, then he should have been defeated in his action. Such contracts are condemned as against public policy, and the rules applicable to them are laid down in many decisions (*Chippewa, etc., R. R. Co. vs. Chicago, etc., R. R. Co.*, 75 Wis., 248; *Frost vs. Inhabitants of Belmont*, 6 Allen, 152; *Harris vs. Roof's Ex'rs*, 10 Barb., 489; *Sedgwick vs. Stanton*, 14 N. Y., 289). Here the jury could find that the plaintiff was not employed to render, and that he did not render lobby services. He was not a lobbyist, and he had no acquaintance or influence with any member of the Legislature, and it does not appear that he had any peculiar facilities for procuring legislation. The jury could find from the evidence

that he was employed by the defendant to draw legislative bills and to explain them to members of the Legislature, and to procure their introduction into the Legislature and nothing more. It does not appear that he asked or solicited any member of the Legislature to vote for the bills, or that he did anything except explain them, and request their introduction; and so much he could do without violating any public policy. It must be the right of every citizen who is interested in any proposed legislation to employ an agent for compensation payable to him, to draft his bill and explain it to any committee or to any member of a committee, or of the Legislature, fairly and openly, and ask to have it introduced; and contracts which do not provide for more, and services which do not go farther, in our judgment, violate no principle of law, or rule of public policy."

151 Mass. 99.

Subject: Decision sustaining Contract assailed as against public policy.

In *Barry v. Capen*, 151 Mass. 99, an action was brought by the plaintiff, a member of the bar, upon a special contract to pay one thousand dollars for professional services. The case was tried in the lower court by the judge without a jury, and the finding of the court was in favor of the plaintiff. On pp. 100-102, the court said:

"The plaintiff's statement of the contract is as follows: The defendant came to his office, and said that he had a case which he wished the plaintiff to attend to: that there had been appropriated twenty-five thousand dollars for Talbot Avenue, which went through the defendant's hands; and that he wanted to have it laid out as soon as possible. The plaintiff asked what the defendant wanted him to do. The defendant answered, 'I want you to appear before the Street Commissioners and advocate the laying of it out, and the terms of damages.' He then stated what damages he thought he ought to get, and offered the plaintiff everything he got over ten thousand dollars. The plaintiff declined to do business in that way, where-

upon the defendant said, 'You go and get as much as you can, and I will pay you a thousand dollars for it.' To this the plaintiff assented."

* * * * *

"The plaintiff did not draw the petition in the case. He was not present at the hearing after the order of notice of intention to take the property. He did not do some other things which it might be supposed that one who really was engaged as counsel would do. On the other hand, from December to January, that is, before public proceedings were begun for laying out the street, he went at least three times a week to see the Street Commissioners. At this time he was chairman of the Democratic City Committee. We perceive the inferences which a jury or the judge in this case might have drawn from these facts, and we appreciate the argument addressed to us upon the evils of corruption, and the invalidity of contracts tending to induce it. But we cannot say that there was not some evidence of a legal contract. We cannot say, as matter of law, that the chairman of the committee of a political party cannot practice his profession—the law—in the City Hall, as well as in the courts. We cannot say that the contract appears, as matter of law, to have contemplated the use of improper influence, or to have necessarily tended to induce it. The words in which the contract is said to have been made did not disclose such a tendency on their face. The political position of the plaintiff, and what was done, are only evidence of what was expected, and are not conclusive that it was expected. What was done moreover was not necessarily improper, even in the particulars mentioned. We have not mentioned those services rendered which were not open to question."

46 Mo. 306.

Subject: Decision sustaining Contract assailed as against public policy.

In *Workman v. Campbell*, 46 Missouri 306, the 3d paragraph of the syllabus is as follows:

"3. Contracts.—Consideration, legality of—depot, location of—railroad company.—A contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and completion of the road, is not void as against public policy unless it appear that sinister, extraneous, or corrupting influences were brought to bear on the Company to superinduce the location."

On pp. 307, 308 the Court said :

"Plaintiff brought his action in the Johnson County Circuit Court to recover the sum of \$200, together with interest, on a subscription made by the defendant. The petition, in substance, sets out that by the subscription paper the defendant, with others, bound himself to pay the amount subscribed to Jno. A. Pigg, Jr., or whoever might present a petition or proposition to the Board of Directors of the Pacific railroad, to be used in securing the location of a depot on the land then owned by Samuel Workman or James McKehan: the money to be paid whenever it was ascertained that the location was made and the road finished to the depot; that the land mentioned in agreement, upon which the depot was to be located, was adjoining the town of Knobnoster; and that, in consideration of the subscription, plaintiff did present to the Board of Directors a petition and proposition for the location of the depot upon the lands mentioned in the subscription paper, and that he expended a large amount of labor and money, to-wit: one thousand dollars, in order to secure the location of the depot, and did secure thereby the location; that the railroad was, on the 2nd day of May, 1864, completed to the said depot, and has ever since been in use to and for the same, of which the defendant was duly notified, and that Pigg assigned the subscription to plaintiff."

"To this petition a demurrer was filed, for the reasons: First, that there was no sufficient consideration stated to support the promise alleged to have been made by the defendant; second, because it was a promise to pay money for influencing public officers, whose duty it was to select a depot with reference to the public convenience and accommodation; third, because the agreement was against public policy; and fourth, because it was an agreement for the exertion of a secret influence and power over the affairs of the corporation, not generally known to the public."

The Circuit Court gave judgment sustaining the demurrer and this judgment was affirmed by the District Court. The decision of the District Court was based on a ground not raised by the demurrer.

The Supreme Court of Missouri in reversing the lower court and over-ruling the demurrer, after considering points which need not be here mentioned (on page 310) said :

" In the case of the *Pacific R. R. Co. vs. Seely et al.*, 45 Mo. 212, we decided that although a railroad company was in one sense a private corporation, yet its chartered privileges were still granted to subserve great public interests, and that it was the duty of the directors and members of the Company to exercise their best and unbiased judgment upon the question of fitness in locating depots, without being influenced by distinct and extraneous interests having no connection with the accommodation of the public or the interests of the Company. The Company have a deep interest in these transactions, and the directors and members of a corporation will not be permitted to reap a private gain or benefit at the expense of the public convenience, and to the detriment of the community."

" But there is nothing set out in the amended petition on which this case was tried, to show that any sinister, extraneous or corrupting influences were brought to bear upon the Company to superinduce the location. It is not alleged that anything was directly paid to the directors, or that they obtained any private advantage in consequence of their action. If such were the facts, as they do not appear on the face of the petition, the objection should have been taken by answer, and the proof submitted upon the trial. How and in what manner the labor and money were expended to secure the location does not appear. If parties voluntarily combine, in furtherance of a great public enterprise, to assist a Company in the erection of a depot, I can see no objection to it, if it is done honestly and in good faith."

" There is nothing to show that the arrangement was either wrongful or corrupt, and the court, in arriving at that conclusion, indulged in a presumption. I think the presumption is

not warranted. The judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer and permit the defendant to file his answer. Judge Currier concurs; Judge Bliss absent."

48 Iowa, 211.

Subject: Decision sustaining Contract assailed as against public policy.

In *Denison vs. Crawford County*, 48 Iowa, p. 211, the case is stated in the syllabus as follows:

"I. Contract: Swamp Lands: Public Policy. A contract between a county and an agent provided that the latter should be authorized to make the proper application to the general government for its swamp lands or indemnity therefor, and that he was to receive one-half of what he thus procured for his services. To effect the object of his contract, certain congressional action became necessary, which he aided in procuring by legitimate means. Held, that the contract was not void as against public policy, and that a county may lawfully employ agents for such purpose, and that an agreement to pay them is valid."

On pp. 215-216 the Supreme Court of Iowa said: * * *

"Congress had recognized the fact that the defendant was entitled to the swamp lands within its borders, and if the same had been sold, to money in lieu of such. Before this claim, however, could be recognized or made available, certain things had to be done by the county. As it turned out after the contract was made, it became necessary to bring the matter to the attention of Congress and obtain further legislation."

"It was perfectly competent for the county to employ agents or attorneys for this purpose, and an agreement to pay them therefor is valid. Such agents may lawfully draft the petition to set forth the claim, attend to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced." Swayne, J., in *Trist vs. Child*, 21 Wall., 441."

"If, however, the agent or attorney conceals from the members of Congress the capacity in which he is acting, or

appears to be other than he actually is, legislation procured thereby may be said to have been obtained by improper means, and a contract to pay a compensation therefor is void as against public policy. *Marshall vs. Balt. & Ohio R. R. Co.*, 16 How., 314."

"In these cases, and all others of a like character to which our attention has been called, either the contract on its face, or when viewed in the light of the circumstances surrounding the transaction, clearly disclosed the fact that improper means and influences were to be used to accomplish the desired end. The parties so contemplated, and contracted accordingly. Nothing of the kind appears here, and if this contract be declared void, then it will be difficult, if not impossible, to make one providing for the compensation of an agent or attorney who may be employed to prosecute claims before any department of the Government. Conceding it to be proper to look at what was done by Skinner when at Washington City, endeavoring to obtain the passage of the act of Congress of March 5, 1872, for the purpose of arriving at the design and intent of the contract (which we very much doubt), still we are unable to say anything was done by him that was improper to accomplish that result."

"There is nothing which tends to show he used any means except such as were calculated to appeal to the reason and judgment of the members of Congress."

"Agents of this State and of Missouri, together with persons employed by other counties, were in Washington endeavoring to accomplish the same result. By their combined efforts, and the justice of the measure asked, they were successful. Without any serious doubt we think Mr. Skinner claims fully as much credit, if not much more, than he is fairly entitled to."

41 Minn., 242.

Subject: Decision sustaining Contract assailed as against public policy.

In *Moyer vs. County*, 41 Minn., 242, the Supreme Court of Minnesota said:

"The plaintiff is an attorney at law. The action is for the recovery of an alleged stipulated compensation for services in ~~procuring the pardon of the defendant's son~~, who was imprisoned for a term of years in the State penitentiary. The appellant's contention, that the Court should declare the contract to have been illegal, cannot be sustained. The presumption of law is in favor of the legality of contracts, and, the object sought to be accomplished being lawful, unless it affirmatively and distinctly appears that it was contemplated that means were to be resorted to for its accomplishment which the law would not sanction, the courts cannot declare the contract invalid. There was nothing unlawful or opposed to public policy in simply employing the plaintiff to endeavor, by proper means, to secure a pardon. *Chadwick vs. Knor*, 31 N. H., 226 (64 Am. Dec., 329); *Formby vs. Pryor*, 15 Ga., 258; *Bremsen vs. Engler*, 49 N. Y. Super. Ct., 172. The grounds upon which constitutional power to pardon may be exercised are not defined in this Constitution; but among the considerations which might properly be brought to the attention of the Governor, and influence his action, are some which suggest the propriety of employing the professional services of an attorney for this purpose, and from the mere fact of an attorney being employed to solicit the pardon of a convict it is not legally inferred that an unlawful course of conduct was intended. For instance, it would be proper, and often expedient, that an attorney at law examine the case upon which the conviction was based to see whether, notwithstanding the final judgment of the law, the case may not be of such a nature as to justify the exercise of the extraordinary power of pardon. He may direct investigations to the discovery of facts bearing upon the question of guilt, not discoverable at the time of the trial. The attention of prosecuting officers and of the judge who tried the cause may be directed to newly-discovered facts, or to any of the circumstances of the case, and their recommendation in favor of a pardon may be sought. Whatever considerations may properly affect the action of the Executive may be urged upon his attention. Even if there was any evidence in this case

which would have justified the conclusion, as a matter of fact, that political influence, or any unlawful means, were expected to be exerted for the accomplishment of the end in view, no case was presented justifying the court in so declaring as a matter of law."

67 Mich., 130.

Subject: Decision sustaining Contract assailed as against public policy.

In *Beal vs. Polhemus*, 67 Mich., 130, the second paragraph of the syllabus is as follows:

"2. An agreement for the payment of a certain sum of money on condition that the payee should erect a building at a specified place, near the payor's property, to be occupied as post-office by a given date, is not void as opposed to public policy, it appearing that the payee used no undue influence in securing the location of said post-office, and was guilty of no corruption or corrupt practice in making such contract."

The plaintiffs sued on the agreement mentioned in the syllabus which was a note for \$600.00, a copy whereof may be seen on the face of the opinion. The lower court gave judgment for the plaintiff. In affirming this judgment the Supreme Court of Michigan (pages 132, 133, 134) said:

"It is contended, in an able argument by counsel for the defendant, that the contract is void as opposed to public policy. This argument is based upon the assumption that Beal, who was a prominent member and leader of the then dominant party in the nation, sold his influence with our Senators, and that this contract was given in payment for such influence; that in consideration of the payment of the sum therein mentioned, Beal stipulated to exert his personal and party influence upon an officer of the government. And it is claimed that such personal influence cannot be a matter of bargain and sale to be enforced by the courts."

* * * * *

"But the argument does not touch the present case. Mr. Beal had a perfect right to be heard before any officer of the government, or any department of the same, as to the merits of his building, as a place for the location of the postoffice."

"It is not shown by the findings or the evidence in the case, that he used any improper means to gain this point, or even that he influenced any Senator or Representative in Congress, or any officer of the government, to interfere in his behalf. He went to Washington personally, and, while there, secured the location of the office where he wanted it; but there is not the slightest testimony that he used any undue means to accomplish his end. We cannot presume that he used his personal power, which is said to have been very great, in a corrupt or unseemly manner, or in violation of any public policy. For aught we know, he appeared as any other citizen might and has a right to do, before the proper office at Washington, and stated the merits of his claim so convincingly and conclusively, that the location desired seemed to be the most proper and available one. Certainly there could be nothing wrong in this. It is true, there is evidence in relation to some of the contracts not in suit, that Beal boasted he could control the Senators from this State, and that he must have money to go to Washington to do so; but there is no testimony that either one of them lifted a hand or said a word in his behalf. And there is nothing to show that in the present case he made any such representations to obtain the contract."

"The defendant agreed to pay a certain sum upon the accomplishment of an object in which he saw a future benefit to his property. That object was attained, and he has had the benefit he desired. There is no valid reason why he should not fulfil the contract on his part, as Beal promptly fulfilled his part of the agreement.

"The judgment of the court below is therefore affirmed with costs."

33 L. R. A., 166.

Subject: Decision sustaining Contract assailed as against public policy.

In *Houlton v. Nichol*, decided by the Supreme Court of Wisconsin May 22, 1896, and reported in 33 Lawyers' Reports Annotated, page 166, the court decided, as stated in the second paragraph of the syllabus, that

"2. A contract for the presentation before the Secretary of the Interior of the legal status of certain public lands with a view of having them thrown open to settlement under existing laws, not as a favor, but as a right to which all persons similarly situated were entitled, without any attempt to procure legislation, is not against public policy, when it does not appear that any act illegal *per se* or of corrupt tendency was contemplated."

And Marshall, J., speaking for the court, page 168, said:

"As applied to contracts like the one before us, the dangers and mischiefs that may arise from allowing parties to make merchandise of mere personal solicitation and influence, is what the law seeks to guard against, by closing the doors of the courts securely against all efforts to enforce, or to secure the fruits of, agreements that involve such elements as a subject of sale, either expressly or by necessary inference. Does the agreement under consideration come within the condemnation of the salutary rule referred to? That is the question. Unless it does, clearly, the contract should be upheld."

"As very truly said by Sir George Jessel, M. R., in *Printing & N. Registering Co. v. Simpson*, L. R. 19 Eq 462: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.'"

"This means no more, we take it, than that it should be

made to appear clearly—that is, beyond reasonable controversy—that the contract is void, as contrary to law or sound morals, else it should be sustained. In the light of the foregoing, the contract in question must be subjected to a judicial interpretation in order to determine whether it contains the fatal element or not; for it cannot be seriously contended that by its terms, either as set forth in the complaint or established by the evidence, it necessarily required the doing of anything of an improper character or necessarily tended to any such thing. Plaintiff agreed to furnish defendant with minutes of desirable lands on the public domain upon which to locate, and to instruct him in respect to what he should do as a settler on such lands in order to secure priority under the land laws of the United States, and to do all that was necessary or could be done to bring the land in question into market, and enable defendant to acquire title thereto. Wherein does this language contemplate the doing of anything illegal? The intention of the parties must be gathered from the language they used, from the contract actually made, in the light of attending circumstances, the same as in any other case. If, properly construed, it does not, by its terms or by necessary implication, contain anything illegal, or tend to any violation of sound morals, the fatal element should not, through an over-zealous desire to fortify against the deplorable effects of lobbying contracts, strictly so-called, which all recognize and should unhesitatingly condemn, be injected into it by mere suspicion and conjecture that the parties intended to do some illegal act, or a legal act by illegal means, or that the agreement might have probably led to improper influences upon, or tampering with, official conduct, and thereby defeat the contract.”

“It is sometimes lost sight of that the presumptions in human affairs are in favor of innocence rather than of guilt, and that such rule applies in testing such a contract as the one we have here by the principles of sound morals. *McBratney v. Chandler*, 22 Kan., 692, 31 Am. Rep., 213.”

And at page 70, the same judge speaking for the court, said :

“The evidence showed that the plaintiff attended sessions

of Congress, appeared before its Committees, and employed counsel to urge the passage of a bill forfeiting lands to the Government, and to open them to settlement in such a way as to secure priority of settlers thereto. So far as we can gather from the reported case, all acts done in regard to obtaining legislation, were prior to the making of the agreement. There was really nothing in the language or purposes of the contract viewed in the light of attending circumstances, and what was actually done, showing that improper influence was contemplated, or that there was any tendency to that end. There was no personal soliciting of members of Congress, or the officers of the Interior Department. The carrying out of the contract did not require or lead to any such thing, for it was, so far as it relates to any official action, a mere agreement to promote the enforcement and application of existing laws and established regulations of the Interior Department to existing conditions, to the end that persons having a right to select and acquire lands on the public domain might exercise such right. This required only the collection of facts and presenting them to the proper officers, and making arguments thereon in respect to the legal status of the lands under the circumstances, and the rights of parties under such existing laws and regulations, to acquire such lands. The fact that plaintiff was not a member of the legal profession makes no difference with the legitimate character of his services, in the face of the undisputed fact that such services required special knowledge and training, and that plaintiff, by years of study and experience, had qualified himself to render valuable services to his employers. Under these circumstances, to infer that the services contracted for were other than such as are sanctioned by *Barke v. Child*, *supra*, the collecting of facts, making of arguments, and promoting action by appeals to reason,—is rather to reverse the rule which presumes innocence rather than guilt, in the affairs of life.

“So far as *Houlton v. Dunn*, *supra*, is inconsistent with the decision in this case, we are not disposed to follow it, but to hold, that unless the contract was for the performance of some act illegal, *per se*, or to do something

of itself of a corrupting tendency, or by its terms, or by necessary implication it contemplated a resort to improper means, such as personal solicitation or influence, something other than an appeal to reason of the department officers whose action was sought, or to obtain their action as a favor instead of as a right, it should be upheld."

3 Head (Tenn.), 92.

Subject: Decision sustaining Contract assailed as against public policy.

In the case of *Nichols v. Cube*, 3 Head (Tenn.), 92.

N. conveyed land to C., in order to constitute him a freeholder that he might go N.'s bail, and to save him harmless as such. There was a verbal agreement that the conveyee was to hold the land as long, only, as was necessary for the purpose. On disclosure of the facts to the court, C. was refused as bail. N. was convicted and sent to the penitentiary, where he died. The widow and heirs of N. sued C. for the land, and he pleaded in defense that the contract between him and N. was contrary to public policy, and there could be no recovery.

The second and third propositions of the syllabus are as follows:

"2. SAME. *If executed for a fraudulent or immoral purpose.* If such deed is made for a fraudulent, criminal or immoral purpose, or, to enable the parties to do any act in violation of law, or contravene any rule of public policy, the courts will not interpose to grant relief, but will leave them, without redress, where their fraudulent conduct has placed them."

"3. SAME. *Same. Evidence must be clear.* To repel a party that has been wronged, from the courts, without redress, the fraudulent, criminal, or immoral purpose must be, clearly, made to appear. Presumptions will not be strained to defeat equity and justice, by closing the doors against the injured."

In the course of its opinion the court, at pp. 94-95, said:

"Nothing was paid, or ever intended to be paid, no risk was run, and no damage sustained, by Clark. It would be iniquitous to allow him to retain the land against the complainants, if the merits of the case can be reached. But the defence is not placed upon the merits, but upon a sound and well-approved legal rule, which, in cases to which it applies, repels parties from

courts of justice, and closes the doors against them, no matter how great their wrongs may have been. This is where the party has been guilty of or contemplated in the particular matter, some fraudulent, criminal or immoral act, some breach of good morals, or where the act was in violation of some rule of public policy. In such cases the courts will not interpose, but leave the parties without redress, whatever claims they may have upon each other.

“ In this case the Chancellor based his action in dismissing the bill upon the ground that the object in conveying to Clark was improper, and against public policy. We do not give it that complexion. That the cause of the act done was to make Clark a freeholder, and as such qualified to become bail, is clear. But was there anything wrong in that? If he had been received without the deed, the land would have been bound in the hands of Nichols, and if after the deed, it would be bound in his hands. The land, in either case, would stand as a security for the penalty of any recognizance or bail bond that might be taken. The purpose was to put Clark in condition to be taken by the Court, by making him a freeholder, which they thought to be indispensable, and, perhaps, such was the practice of the Court. What fraud was that intended to perpetrate? It could make no difference whether he paid anything for it or not, the land would have been equally bound to the State. No imposition was or could have been practiced upon any one. It is not unusual or contrary to public policy for a criminal to give bail, or to endeavor to procure bail, by conveying his property to others, to render them responsible for the penalties to be incurred. If Clark had been otherwise good, and this land had been expressly mortgaged in due form, or in any legal mode, for his security, there could have been no objections. What difference can it make where there was the double object of both qualifying and securing him? It is said that the object was to induce Clark to commit perjury before the Court, when offered as bail, by stating that the land was his. This was not at all necessary. It was sufficient that he had title to the land so as to bind it under his recognizance. It was only important to the State that he had such a title as would subject the land in case of forfeiture. Nothing

else was necessary to be stated to accomplish the objects intended. No necessity for false swearing was imposed by the transaction.

"It is also insisted that the whole scheme was to get the criminal out upon bail, that he might make his escape from justice. If that were so, it would be such an unlawful purpose as would stain the hands of all concerned, and exclude them from the courts. But there is no evidence that such was the intention. From all that we can see, nothing more was designed than to be admitted to bail in the ordinary way, and for the common reasons. We are not to strain presumptions to defeat equity and justice, by closing the doors against the injured. It ought to be a clear case of turpitude, or violation of public policy, to repel a party that has been wronged from the courts of justice. The effect of applying the rule of repulsion in this case would be to shield the defendants in a case of most glaring iniquity."

10 La. Ann., 199.

Subject: Decision sustaining Contract assailed as against public policy.

Hertz vs. Wilder, 10 Louisiana Annual, 199—suit upon five promissory notes by attachment—defense, want of consideration; in support of which documentary and oral evidence was introduced tending to prove a corrupt and immoral contract connected with the giving of the notes which were said to be without other consideration.

The syllabus of this case, page 199, is as follows:

"Although a party may sometimes be permitted to allege and prove that the form of a legal contract has been used to cover a corrupt or flagitious transaction, yet such an allegation puts the party who makes it in a position so questionable, that the Judge is not only authorized, but obliged, to sift with the greatest care the evidence adduced in its support, and only to give his credence when the evidence is so complete that it

forces itself upon the conviction with the power of demonstration."

Group of English Cases, prominently cited in text books, touching question of public policy.

For English authorities bearing favorably upon the complainant's case upon the *general question* of public policy, see:

Edwards vs. Grand Junction Ry Co., 13 Eng. Ch., 1 My. & Cr., 649.

Stanley vs. Chester & Birkenhead Ry Co., 14 Eng. Ch., 773.

Simpson vs. Lord Howden, 37 E. C. L., 249; on

Appeal to House of Lords, 9 Clark & Fin., 61.

In the last mentioned case, Lord Howden, a peer of Parliament, sued upon a covenant contained in a deed by which, in consideration of his withdrawing opposition to a bill for a projected railroad passing through his estates, the defendants promised, if possible, to deviate that road and to pay him a large amount of damages. Both the lower court and the House of Lords sustained the right of the plaintiff to recover. The opinion of the lower court is especially strong and vigorous, and the following is an extract therefrom:

* * *

The ground upon which the deed in question was contended to be a fraud on the Legislature is this: that the plaintiff and defendants were to be considered as having agreed together to represent to the Legislature the line of road described in the then pending bill as the line which was to be adopted and acted upon, whilst, in truth, they intended at the time to apply for, and adopt, and act on, another, if obtained. This is the view which Lord Langdale inclined to think might ultimately be taken of this transaction. *Simpson vs. Lord Howden*, 1 Keen, 583. It was also argued that Lord Howden and the proprietors must be considered as having agreed to represent the proposed line of the road as the best for the public interests, though in reality they never meant to carry it into effect, and had a better

in prospect. In either view of the case, the supposed fraud consists in an intention to make a false representation to the Legislature, by stating the object of the adventurers to be to carry one line into effect and concealing the design of applying for another. In both it is essential in order to make the deed a fraud upon the Legislature, that the contract to apply for a new act should be intended by both parties to be kept secret from it. For, if it was to be disclosed, the idea of an intended fraud upon the Legislature is obviously out of the question. It is not enough that the existence of such an agreement was, at the time of entering into it, and afterwards, in fact, kept secret from the Legislature and all the world besides by both parties. The quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it: and, if there did not then exist the intention of deceiving the Legislature by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment." * * * *

See also the following American cases:

Spauldin v. Mason, 161 U. S., 376-397.

Wylie v. Core, 15 How., 415.

Wright v. Tibbetts, 91 U. S., 252.

Stanton v. Embrey, 93 U. S., 548.

Taylor v. Burriss, 110 U. S., 42.

Sedgwick v. Stanton, 44 N. Y., 289, 293-4.

Southard v. Boyd, 51 N. Y., 177-179.

Lyon v. Mitchell, 36 N. Y., 235.

Bridgford v. City of Tusculum, 16 Fed. Rep., 910.

WITHDRAWAL OF COMPETITION.

As above stated, the only class of contracts contravening public policy to which, in the several arguments below, any earnest effort was made to assimilate the case at bar, was—contracts held void as providing for the *withdrawal of competition* in which the public is interested and by which it is likely to be benefited. We have already denied the applicability of the rule, and denied that, in our case, there was any withdrawal or loss of competition likely to prove of advantage to the public; and we have submitted that *concealment* is a necessary element in invalidating contracts upon this ground. We now assert and will endeavor to show that the authorities upon this branch of the case embody limitations, qualifications and exceptions which clearly exclude the case at bar.

Some of the leading cases are as follows:

- Wicker v. Hoppock*, 6 Wall., 94.
- Kearney v. Taylor*, 15 How., 495.
- Phippen v. Stickney*, 3 Mete., 384.
- Marsh v. Russell*, 66 N. Y., 288.
- Bellows v. Russell*, 20 N. H., 427.
- Oakes v. Catt. Water Co.*, 143 N. Y., 431.
- Jenkins v. Frink*, 30 Cal., 586.

6 Wall 94.

Subject: Withdrawal of Competition.

In the case of *Wicker v. Hoppock*, 6 Wall 94, the first paragraph of the syllabus is as follows:

"1. The rules about judicial sales which make void as against public policy agreements that persons competent to bid at them will not bid, forbid such agreements alone as are meant to prevent competition and induce a sacrifice of the property sold. An agreement to bid, the object of it being fair, is not void."

On pp. 97-98 Mr. Justice Swayne, delivering the opinion of the Court, said :

" It is said that the agreement between the parties ' was invalid because calculated to interfere with, and prevent the fairness and freedom of a judicial sale ; and prevent competition, and therefore against public policy.'

" The contract was, that the defendant in error should procure judgments against Chapin & Co. for the rent in arrear, levy upon the machinery and fixtures in the distillery, and expose them for sale, and that the plaintiff in error should bid for them the amount of the judgments.

" The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished. If the object be fair—if there is no indirection—no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained.

" In one of the cases to which our attention has been called there was an agreement between two persons, that one of them only should bid, and that after buying the property he should sell a part of it to the other upon such terms as the witnesses to the agreement should decide to be just and reasonable.

" In another it was agreed that a party should bid a certain amount for a steamboat about to be sold under a chattel mortgage, and transfer to the mortgagor an undivided interest of one-third, upon his paying a corresponding amount of the purchase-money.

" In a third case the agreement was between a senior and junior mortgagee. The former agreed to bid the amount of his debt for a specific part of the mortgaged premises.

" In each of these cases the arrangement was sustained upon full consideration by the highest judicial authority of the State.

" In the case before us, the agreement was, that Wicker should bid. There was no stipulation that Hoppock should

not. There was nothing which forbade Hoppock to bid, if he thought proper to do so, and nothing which had any tendency to prevent bidding by others. The object of the contract, obviously was to be secure,—not to prevent bidding. The benefit and importance of the arrangement to the interests of the judgment debtors is made strikingly apparent when the subject is viewed in the light of the consequences which followed the breach of the agreement. Instead of the property selling for the amounts of the judgments, Hoppock was the only bidder, and the property sold was struck off to him for a nominal sum.

“There was no error in the ruling of the court upon this subject.”

15 How., 495.

Subject: Withdrawal of Competition.

In the case of *Kearney vs. Taylor*, 15 How., 495, the United States Supreme Court (pages 519–521) said:

“There are some cases deriving their principles from the severe doctrines of *Berwell vs. Christie*, Cowp., 396, and *Howard vs. Castle*, 6 T. R., 642, to be found in books of high authority in this country that would carry us the length of avoiding this sale, simply on the ground of this association having been formed for the purpose of bidding off the premises, for the reason that all such associations tend to prevent competition, and thereby to a sacrifice of the property. (3 Johns. Cas., 29; 6 Johns., 194; 8 Id., 444; 13 Id., 112; 2 Ham., 505; 5 Halst., 87; 2 Kent, 539; 1 Story’s Eq. Jur., sec. 293). Later cases, however, have qualified this doctrine, by taking a more practical view of the subject and principles involved, and have placed it upon ground more advantageous to all persons interested in the property, while at the same time affording all proper protection against combinations to prevent competition. (2 Dev., 126; 3 Mete., 384; 25 Maine, 140; 2 Const., S. C., 821; 3 Ves., 625; 12 Id., 477; 11 Serg. & Rawle, 86).”

“It is true that in every association formed to bid at the

sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all. The property at stake might be beyond the means of the individual, or might absorb more of them than he would desire to invest the article, or be of a description that a mere capitalist, without practical men as associates, would not wish to encumber himself with. Much of the property of the country is in the hands of incorporated or joint stock companies; the business in which they are engaged being of a magnitude requiring an outlay of capital that can be met only by associated wealth. Railroads, canals, ship channels, manufacturing establishments, the erection of towns and improvement of harbors, are but a few of the instances of private enterprise illustrating the truth of our remark. It is apparent that if, for any cause, any one of these, or of similar masses of property, should be brought to the stake, competition at the sales could be maintained only by bidders, representing similar companies, or associations of individuals of competent means. Property of this description cannot be divided, or separated into fragments and parcels, so as to bring the sale within the means of individual bidders.

"The value consists in its entirety, and in the use of it for the purposes of its original erection; and the capital necessary for its successful enjoyment must be equal not only to purchase the structures, establishments or works, but sufficient to employ them for the uses and purposes for which they were originally designed."

"These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably

to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders."

"We must therefore look beyond the mere fact of an association of persons formed for the purpose of bidding at this sale, as it may be, not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it: and if, upon such examination, it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it, to participate in the biddings, the sale should be upheld—otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the property at a sacrifice."

"Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each."

3 Metcalf, 384.

Subject: Withdrawal of Competition.

In *Phippen vs. Stickney*, 3 Metcalf, 384, an action was brought to recover \$100 for breach of an agreement in the following words:

"Know all men by these presents, That I, Richard Stickney, in consideration that Hardy Phippen will permit me to purchase a certain piece of land, to be sold this day, bounded on said Phippen and myself, do hereby agree to purchase the said lot of land, and by this instrument do hereby agree to sell and convey to said Phippen the said piece of land on such terms as we, the said Phippen and Stickney, shall hereafter agree upon, or on such terms as the witnesses to this instrument shall decide to be just and reasonable: Said conveyance to Phippen to be made by said Stickney as soon after the sale to be made this day, as can reasonably and conveniently be made; it being understood and agreed that the said Stickney will reserve the court or passage way, and the trees on the lot said Stickney agrees to convey to Phippen and his heirs, to himself; said trees to remain on the land until the fall, or a suitable time to remove them. In default of any part of the con-

dition of this agreement, we bind ourselves, and our heirs respectively, in the sum of one hundred dollars, to be duly paid to the injured party. Salem, May 23, 1838. In witness whereof we this day fix our hands and seals." (Signed and sealed by both parties, and attested by three subscribing witnesses.)

On pages 388-389, the Court said :

"It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we cannot judicially declare that every contract between two or more individuals, in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void as a fraud upon the rights of the vendor and as against public policy, merely because he who seeks to enforce the contract may have been thereby induced to abstain from bidding. Cases may readily be imagined, and indeed are of frequent occurrence in sales of large magnitude, where two or more persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding. By such an association as is just supposed, the interest of the vendor, as well as that of the vendees, would be directly advanced."

"The extent, to which the doctrine of invalidating such contracts can be safely carried, would rather seem to embrace within the rule all cases of fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property. Beyond this, the application of the principle contended for may be found productive of mischief and an unwarrantable interference with the course of business in auction sales. We are therefore of opinion, that an agreement between A. and B., that A. will permit B. to become the purchaser of certain property about to be offered at sale at public auction, and that A. shall participate with B. in the benefits of the purchase, will or will not be fraudulent, as the circumstances of the case show innocence

of intention or a fraudulent purpose in making such agreement; that where such arrangement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for sale, below the fair market value, it will be illegal, and may be avoided as between the parties, as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding."

"In the case before us, upon the facts stated, we do not feel authorized to set aside this agreement as illegal or fraudulent upon the principles we have stated. Fraud is not to be presumed, where the contract is, on the face of it, consistent with honesty of purpose and fair dealing. If the defendant would avail himself of a defense of that character, it must be upon the finding of a jury, or upon a case stated by the parties clearly disclosing such fraudulent purpose. This contract might have been entered into by these parties, for good and justifiable reasons; and it is not, therefore, to be deemed fraudulent and void upon face of it."

66 New York, 288.

Subject: Withdrawal of competition.

In *Marsh vs. Russell*, 66 N. Y., 288, the action was for an accounting as between co-partners. "The complaint set forth the following contract:

"It is hereby understood and agreed, by and between the undersigned, that if the undersigned, or either of them, shall make a contract with one or more towns in Washington County, N. Y., to fill the quota of such town or towns, under an anticipated call of the government for volunteers, for a sum not less than five hundred dollars per man, that all gains or profits which may accrue in such business shall be divided equally, share and share alike, between the under-

signed, and that all losses shall be paid equally by them. It is further understood and agreed that the undersigned, or either of them, shall make no agreement to furnish the quota of any town for a less sum than five hundred dollars per man, without the consent of all the undersigned. That if two or more towns shall be contracted with to furnish their respective quotas for five hundred dollars per man, or more, by the undersigned, then, and in that case, it is hereby understood and agreed that the undersigned shall furnish eighteen men, or whatever the quota of the town of Hebron may be, at the rate of four hundred dollars per man."

"June 18, 1864.

(Signed) WM. A. RUSSELL,

(Signed) H. R. COWAN,

(Signed) A. M. BATES,

(Signed) P. J. MARSH."

(Copy.)

The following are extracts from the opinion of the court, pages 291-294 :

"Earl, J. The complaint was dismissed upon the ground that the contract set out therein was upon its face against public policy, and therefore void: the claim on the part of the defendants being that the necessary and direct effect of the contract was to prevent competition between parties thereto in furnishing recruits."

"The contract made the parties thereto partners in furnishing recruits for the towns of Washington County. They were to be jointly interested in the business and to share equally in the profits and losses thereof. As regulations of their business, they provided that the individual contracts of the members of the firm should inure to the benefit of the firm and that no contracts to furnish recruits should be made for a less sum than \$500 for each recruit. It does not appear that the parties had control of any recruits, much less that they had a monopoly of them, or that the towns were in any way obliged to get their recruits from them, or that the price charged was an unreasonable or unusual price, or that the parties did or could, by their contract, put up the price of recruits or embarrass the town in filling their quotas, or that the agreement was kept a secret. It is not a necessary inference from the terms of the contract that the purpose of the parties was an improper

or unlawful one, or that its effect would be to thwart the policy of any law or to injure or jeopardize any public interest."

"The business of furnishing recruits was a lawful one, and could be carried on by individuals or firms; when carried on by a firm its members could regulate the price at which they would buy and sell, as they could if they had been dealers in other articles having a price. Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their articles of co-partnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price nor sold for less than a certain other price? Such an agreement would, certainly, not upon its face, be unlawful, and could only be condemned by proof that it was part of a conspiracy to control prices or create a monopoly, or that it was made for some other unlawful purpose."

"Our attention has been called to no case in conflict with these views. In *Gulick v. Ward* (5 Halst., 87), *Gardiner v. Morse* (25 Maine, 140), *Doolin v. Ward* (6 Johns., 194) and other cases cited, there were agreements to prevent competition at auction sales made by public officers or in pursuance of law of property which was required to be sold to the highest bidders, and hence the agreements were held to be against public policy and void. At such sales firms may bid as well as individuals, and if the firms are formed for the honest purpose of carrying on a joint business, it matters not that the incidental effect may be to diminish the number of bidders. If, however, the primary object of the firm is to prevent competition then it might be considered as against public policy. In *Atcheson v. Mallin* (43 N. Y., 147) the general rule was laid down that when a contract for the performance of any public service or work is to be awarded to the bidder therefor offering terms most favorable to the public, any agreements between parties, designing to make bids, tending either directly or indirectly to restrain or lessen rivalry and competition between them, is void as against public policy; even although it may not appear that such agreement did really produce any result detrimental to the public

interest. In that case, however, Folger, J., stated that: 'A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not forbidden by public policy.'

* * * * *

"The true rule is laid down in *Phippen v. Stickney* (3 Met., 384) where it was held that an agreement between A and B that A will permit B to become the purchaser of certain property about to be offered for sale at public auction, and that A shall participate with B in the benefits of the purchase, was not upon its face fraudulent, but would or would not be so, as the circumstances of the case showed innocence of intention or a fraudulent purpose in making such agreement. * * *

"So here, if it could be shown that this agreement was made by the parties for the purpose of perpetrating frauds upon the towns of Washington County and compelling them, by preventing competition, to pay an enhanced price for recruits, and not for the honest purpose of carrying on a legitimate enterprise in an honest way, it would be brought within the cases cited by the learned counsel for the defendants and would be considered as against public policy."

20 N. H., 427.

Subject: Withdrawal of Competition.

In *Bellows vs. Russell*, 20 New Hampshire, 427, suit was instituted upon a contract in the following words:

"It is agreed that the subscribers shall, on their joint account, endeavor to procure the mail contract on route No. 169, from Haverhill to Lancaster, N. H., from July 1, 1837, to June 30, 1841; and in case they succeed it shall be divided at Littleton, the north half to belong to the subscriber, George Bellows, and the south half to the subscribers, the Littleton Stage Company; and in case of disagreement between the parties in relation to the division and apportionment of the mail money, it shall be submitted to the decision of some competent person. In case the contract shall be obtained by either of the parties, or by a third person for the benefit of either party, it shall be in trust for the purpose aforesaid.

(Signed) GEORGE BELLOWES,

(Signed) LITTLETON STAGE CO.,

(Signed) By L. A. RUSSELL, Agent.

May 2, 1837."

The only question submitted was as to the legality of the contract. As to this, the plaintiff admits that at the time when it was made the parties met at Littleton, in this State, and learning that each intended to bid for the mail route named, and had made some preparations for that purpose, entered into the contract, reduced the same to writing, and signed it.

On page 429, Gilchrist, J., delivering the unanimous opinion of the Superior Court of Judicature of New Hampshire, said :

"It is, therefore, a well-settled doctrine, and is undoubtedly a reasonable one, that holds to be illegal and fraudulent a combination of parties for the express purpose of preventing competition among bidders at an auction, with a view to take advantage of such a state of things for their own benefit.

"It is, however, a different thing entirely to hold that where several parties desire, for any reasonable and just purpose, to become the joint purchasers of property exposed at auction, or to become interested together in the contract so exposed for the competition of bidders, they may not lawfully employ one of their number to act in behalf of the whole, and to bid off for their benefit the property, job or contract so offered.

"Accordingly, it has been held in *Massachusetts, Phippen v. Stickney*, 3 Met., 384, upon a thorough examination of the cases, that the question as to the legality of such associations depended upon the circumstances in which they are formed. Mr. Justice *Dewey*, in delivering the opinion of the court, observes : 'It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we cannot judicially declare that every contract between two or more individuals in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void, as a fraud upon the rights of the vendor, and as against public policy, merely because he who seeks to enforce the contract, may have been thereby induced to abstain from bidding. Cases may readily be imagined, and indeed are of frequent occurrence, in sales of large magnitude, where persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding.'

"The conclusion of the Court in that case was that fraud could not be

presumed, and that the party who would avail himself of such a defense must first establish the fact by a verdict of the jury."

"We are of the opinion that such is the only just and tenable doctrine on the subject. The intent, and other circumstances attending the consent of the parties to the arrangement disclosed in this case, must settle its legal character.

"The act of Congress relating to the subject, and to which our attention has been directed, seems to contain nothing relating to the question between these parties more than is comprised in the general principles of the common law. It prohibits the Post-master-general from granting contracts to such as shall have entered into 'any combination to prevent the making of any bid,' or who shall have given or promised to give any consideration to induce others not to bid.

"The fair construction of this statute seems not to require us to consider as such a combination an agreement in good faith between several, that one should bid for the whole.

"The case must, therefore, stand for trial upon the question of the alleged fraud."

143 New York, 431.

Subject: Withdrawal of Competition.

In the case of *Frank S. Oakes, Appellant, v. The Cattaraugus Water Company*, decided by the Court of Appeals of New York, November 2d, 1894, 143 New York Rep., 43, the plaintiff sued upon an agreement in the following words and figures:

"Cattaraugus, N. Y., Feb. 18, 1890.

"This agreement, made by and between the Cattaraugus Water Company, of Cattaraugus, N. Y., and F. S. Oakes, of the same place, Witnesseth: The Cattaraugus Water Company hereby agrees to and with F. S. Oakes to pay him the sum of One Thousand Dollars in consideration of his services to said Water Company in securing right of way, hydrant rental and placing investments, and in all things pertaining to the building of water works at Cattaraugus, N. Y.

"Said sum to be paid at the completion of said works

"Said services to consist of aiding and helping the said Company in the above matters, but without cash expense to said Oakes.

"If said water works are not constructed in Cattaraugus by said Company, then this agreement to be null and of no effect

"This agreement shall be binding on the successors and assigns of the said Company.

(Signed)

"GEORGE N. COWAN,

"Att'y for Cattaraugus Water Co.

(Signed)

"F. S. OAKES."

The trial court non-suited the plaintiff and the general term of the Supreme Court in the Fifth Judicial department denied the motion by the plaintiff for a new trial and ordered judgment in favor of the defendant. The plaintiff appealed and the Appellate Court reversed the decision of the lower court and granted a new trial.

O'Brien, Judge, in delivering the opinion of the court, pp. 437-9, said :

"But it is insisted that the contract, even if regarded as the corporate obligation, is void as against public policy. There was proof given at the trial tending to show that the plaintiff, before entering into the contract with Cowan, contemplated an application in his own name to the two authorities for permission to form a corporation to construct the works, and that the purpose of the agreement was to compensate him for consenting to abandon the enterprise and allow the defendant to obtain the consent and reap the benefit of the enterprise. It is alleged in the complaint that at the time of entering into the agreement it was understood and agreed between the parties that, in addition to the consideration mentioned in the writing for the payment of the one thousand dollars, the plaintiff was not to prosecute or carry on the business for which the defendant was subsequently organized, and was not to organize any corporation for that purpose, or to ask or receive a franchise from the town authorities for that purpose. It was further alleged that the plaintiff kept and performed these conditions, which were not expressed in the writing, but fully understood between the parties, but did assist Cowan in his efforts to accomplish the purpose originally contemplated by the plaintiff. These allegations are, however, put in issue by the answer. The

proof would have justified a finding by the jury that the plaintiff's promise to abandon the enterprise and leave the field open to Cowan and his associate, was an element that entered into the contract, and an inducement to its execution. No such purpose, however, appears upon the face of the contract. The consideration there expressed for the payment of the money was services which the plaintiff could lawfully perform, and which it is claimed he did perform for the defendant. The court was not warranted in holding, as matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for a purpose other than that stated upon its face. If that question was in the case at all, it was one for the jury, as the evidence was not conclusive, but open to different inferences. But we think that this agreement, upon any view of the facts, does not come within that class of contracts which are forbidden or are held void on grounds of morality or public policy. There was no purpose to suppress competition or bidding at any public sale, or letting of a contract for public purposes or in restraint of trade, or to influence the action of public officials. Assuming that both the plaintiff and Cowan intended to apply for the franchise, and the latter persuaded the former to abandon his purpose and aid him in the manner mentioned in the contract for the consideration promised, there was nothing immoral or that threatened the public interests or the public good in such an arrangement. If the business of a private individual or corporation is threatened with competition, it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed, and take employment with the one remaining in the business at a stated compensation. Such an agreement fairly entered into is legitimate business. If the parties in this case deemed it for the interest of both that only one application should be made for a franchise that could be granted to but one of them, the arrangement does not, as I conceive, violate any settled rule or principle of public policy. (*Diamond Match Co. v. Roher*, 106 N. Y., 473; *Leslie v. Lorillard*, 110 *Id.*, 519; *Tode v. Groes*,

127 *Id.*, 480; *Watertown Thermometer Co. v. Pool*, 51 Hun., 157; *Cameron v. N. Y. & Mt. Vernon Water Co.*, 62 *Id.*, 269.

"For these reasons the judgment should be reversed and a new trial granted, costs to abide the event."

30 Cal., 586.

Subject: Withdrawal of Competition.

In *Jenkins v. Fink*, 30 Cal., 586, the first and second paragraphs of the syllabus are as follows:

"Combination to buy property at Sheriff's sale:—An agreement in writing among several parties, by which one is to purchase land, about to be offered at Sheriff's sale, for the benefit of all the parties to the contract, each furnishing his proportion of the money to the buyer, is not, *prima facie*, fraudulent, nor opposed to public policy."

"When a combination to buy property at Sheriff's sale fraudulent.—"A contract in writing between several persons for one to buy land about to be offered at Sheriff's sale, for the benefit of all the parties, is void as against public policy, and fraudulent, if made to prevent fair competition in bidding, or for any other fraudulent purpose. But if made for mutual convenience of the parties, to enable each to become the owner of a part of the property, or for any other reasonable or honest purpose, the contract will be valid and binding."

General View of the Case at bar as related to the Law of Public Policy.

Indeed, when this case is viewed, as it must be upon demurrer, when all of its features and surroundings are considered, especially that the general project had already been approved by the Legislative body, and the plaintiff and his associates approved as proper persons to receive the grant of the franchise for the same; when, in the ordinance submitted un-

der the contract, and finally passed, the Council reserved absolute choice and control as to the motive power and the character of the road, when, not only was there an utter absence of concealment, but on the contrary a frank and full disclosure of the contract and of the entire case to the Legislature, when indeed every feature reprobated and condemned by the Courts, is absent from the transaction, and every mark of good faith, fair dealing, and proper care and caution, is present, we think we are entitled to say that, to class this case with those in which competition has been improperly withdrawn or stifled, to the detriment of the public; or even to class it anywhere with contracts reprobated and held void as violative of sound public policy is to be guided by forced analogy and strained inference, to an unwarranted and shocking conclusion.

The *second* of the two questions which the law of Public Policy propounds, when applied to the facts of the case at bar, is the following, to-wit :

WHETHER, AFTER A CONTRACT CONTRARY TO PUBLIC POLICY HAS BEEN CONSUMMATED, AND THE FRANCHISE (OR OTHER BENEFIT) CONTEMPLATED IN SUCH CONTRACT HAS BEEN SECURED, AND ONE PARTY HAS APPROPRIATED ALL THE BENEFIT, AND THE OTHER SEEKS JUSTICE AT THE HANDS OF THE COURT AND A FAIR DIVISION ; WHETHER, WE SAY—UNDER SUCH CIRCUMSTANCES—A COURT OF EQUITY AND OF CONSCIENCE WILL ENTERTAIN AND APPROVE THE PLEA OF THE WRONGDOER, THAT THE ORIGINAL CONTRACT WAS IMMORAL AND INVALID ?

Brooks v. Martin, 2 Wall., 70, 80, 81.

Antoine v. Smith, et als., 40 La. Ann., 560.

M. & L. Ry. v. Concord R. R. Co., 66 N. H., 100.

McMullen v. Hoffman, 75 Fed. R., 547.

Wilson v. Owen, 30 Mich., 474.

Gilliam v. Brown, 43 Miss., 641.

Martin v. Richardson, 42 Am. St. R., 353.

The following is an extract from the opinion of the court

delivered by Mr. Justice Miller, in the leading case, in 2 Wal., 70, 80-81 :

BROOKS vs. MARTIN.

That great Judge said :

"In *Sharp v. Taylor*, a case in the English Chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition, she made several trips, which were profitable; and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with the plaintiff for his share of the profits, or to acknowledge his interest in the ship. When plaintiff brought his suit in Chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the court from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor Cottenham, and from his opinion we make the following extracts : 'The answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor' (the defendant) 'received the money; and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defence by one against the

otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tennant v. Elliott* and *Farmer v. Russell*, and recognized, and approved by Sir William Grant, in *Thomson v. Thomson*."

"These cases are all reviewed in the opinion of this court in the case of *McBlair v. Gibbs*, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us."

40 La. Ann., 560.

Subject: Rule after contract consummated.

The Supreme Court of Louisiana, in the year 1888, gave its unqualified approval to the doctrine announced in *Brooks v. Martin*. In the case of *Antoine v. Smith et als.*, 40 Louisiana Annual Reports, p. 560, the first two paragraphs of the syllabus are as follows:

"Where the cause of the contract sought to be enforced, is unlawful and opposed to good morals and public policy, there is no right of action in the courts, for either party *suing through it*, to enforce it."

"But, after the reprobated transaction has become an accomplished fact, neither party can legally interpose such illegality or turpitude as a defence."

And on pages 567-68, Watkins, J., delivering the unanimous opinion of the court, said:

"But, however much we may reprobate such scandalous

transactions; however much we may feel constrained, for decency's sake, to summarily eject the plaintiff from the portals of the temple of justice, it is our deliberate opinion that it cannot be done in the present attitude of this affair.

"Fortunately, the *regime* in which such abuses were possible, has long since terminated and passed into history, and the people who were instrumental in bringing it about have passed from the stage of action. George L. Smith is dead, and the plaintiff has ceased to be Lieutenant-Governor; D. D. Smith is no longer the representative of George L. Smith, but he is representing his heirs. There stands on the books of the Lottery Company 200 shares of its capital stock, to which *one* of the parties is entitled, irrespective of the fraud and speculation that may have characterized the transactions, through which its issuance and transfer were procured.

"We understand this to be the jurisprudence established on that subject by the Supreme Court. In *Brooks v. Martin*, 2 Wallace, 80, that great Court employs this striking language, viz:

"There was then, in the hands of the defendant, lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced.

"It is to have an account of these funds and a division of these proceeds that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong *originally* done or intended, to the soldier? * * *

"The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become *accomplished facts* and cannot be affected by any action of the Court in this case.'

"This opinion was most carefully and deliberately expressed after a thorough review of the best American and English cases on the subject, and the doctrine meets our unqualified approval * * *

66 New Hamp. 100.

Subject: Rule after contract consummated.

In *Manchester and Lawrence R. R. v. Concord R. R.*, 66 New Hampshire, 100, the Court at p. 132, said :

“There is, however, another ground of relief which should be briefly mentioned. The contracts have been executed on the part of the plaintiffs: they were not immoral, and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly *in pari delicto*, the case still falls within the general rule, that ‘if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant relief in the case.’ *Mor. Corp., S.*, 721. He adds—‘These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received’—citing: * * *

Then follows a discussion of *Brooks v. Martin*, in the course of which the court, on page 133, said: “It requires no words to apply the doctrine of *Brooks v. Martin*, 2 Wall., 70, to the present case: it applies itself. Nor do we find that its application involves any immorality, or that it is forbidden by any other reasons of public policy. Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion; but it is peculiarly the office of equity to do justice, and justice manifestly requires that the defendants should not keep any part of the plaintiffs’ equitable

share of the property they obtained from operating the plaintiffs' road, whether legally or illegally. Whatever the Legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railway for its violation. And however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds: and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain.

* * * * *

75 Fed. R., 547.

Subject: Rule after Contract Consummated.

In *McMullen v. Huffman*, 75 Fed. R., 547, decided by the Circuit Court of the United States for the District of Oregon, the syllabus is as follows:

" 1. CONTRACT OBTAINED BY IMMORAL MEANS. ACCOUNTING BETWEEN CONTRACTORS.

"The fact that parties have, by immoral means, obtained an award of a joint contract with a city for the construction of a public improvement, will not prevent one of them from maintaining a suit against the other for his share of the profits made by performance of the contract. 69 Fed., 509. Reversed.

" 2. CONTRACTS FOR PUBLIC IMPROVEMENTS. BIDS BY CONTRACTORS.

"One bidding for a contract to be let by a city is under no obligation to give the city the benefit of knowledge acquired at his own expense by obtaining the estimates of competent engineers as to the cost of constructing the proposed work, even if the means of such knowledge is not within the city's reach.

"3. SAME. ATTEMPTED FRAUD.

"The contractors, by previous agreement, made a bid for their joint benefit, in the name of one of them and a third person, for the construction of certain city improvements, and the contract was awarded to them. One of them, with the other's knowledge and consent, had made a separate bid at a much higher figure, which was not seriously intended. The City Engineer's estimate was higher than the latter bid, and there were three other bids still higher. *Held*, that even if the second bid was put in for a fraudulent purpose, there was, under the circumstances, no room for the inference that it had any influence in the making of the award; and, as the attempted fraud was therefore unsuccessful, it could furnish no ground for refusing to compel one of the contractors to account to the others for his share of the profits made under the contract.

"4. SAME.—ACCOUNTING.—CONTRACTOR'S SALARY.

Where two contractors, by a joint bid, secured a contract to construct a pipe line for the water supply of a city, and one of them failed to furnish his part of the capital, so that the other was obliged to raise all the money needed, and also had the entire charge and supervision of the work; *held*, the profits being \$140,000, that the latter was justified in crediting himself with \$1,000 per month as salary.

This was a suit in equity by John McMullen against Lee Hoffman to compel an accounting for profits made by the parties on a joint contract under which they constructed a pipe line for the city of Portland.

In delivering his opinion Bellinger, District Judge, at pp. 548-9 said:

" * * * The defendant refused to account to the plaintiff for any part of these profits, upon the ground that the agreement for a joint bid tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and therefore will not be enforced in equity, and upon the further ground that the complainant wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement to share the earnings of the contract with complainant was made. In this case the contract was in fact the joint contract of these two parties. However immoral the means by which the award of that contract was secured to them, it does not lie in the mouth of either to dispute upon such grounds the right of the other

to share in the profits of that contract. This principle has been applied where the contracts were to do what was forbidden by law or by public policy, and were executed, although in this case the contract was to do a lawful thing. It is only when the fund is the result of an immoral transaction that contribution between the wrong-doers will not be enforced. If the means by which this contract was procured are immoral, this would be a good ground for a refusal by either party to proceed with it, or for a refusal by an injured party to abide by its conditions. Nor is it a case where one party seeks to enforce an illegal agreement for a share in the profits of a contract held by another, as was my conclusion when the case was considered upon exceptions to the answer. The contract with the city was, as between the parties, the contract of McMullen and Hoffman. It makes no difference in whose name it was taken, although, in fact, it was taken in the name of neither, but in that of Hoffman and Bates, for the benefit of Hoffman and McMullen. The case is not in the least different from what it would be if the suit was by Hoffman against McMullen for a division of moneys received from the profits of this contract by the latter.

"When these questions were considered by me on the exceptions to the answer (69 Fed., 509), I was of opinion that it was within the principle of those cases involving agreements for a division of the fees of public officers and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the Court is asked to compel by its judgment the very thing prohibited by public policy, while in the other it is asked to compel pay for a service forbidden by such policy. The question of division of profits between two parties having equal rights is a very different one. The distribution of the profits of this contract, which are as much the property of one of the parties as of the other does not violate any rule of morals or of public policy. * • *"

30 Mich., 474.

Subject: Rule after Contract Consummated.

In *Willson vs. Owen*, 30 Mich., 474, members of an illegal horse-fair association seek to recover moneys thus illegally made from the treasurer thereof. Cooley, J., read the opinion of three out of the four judges, in the course of which he said (page 475):

“ We also think the court below decided correctly in overruling the objection to the action on the ground that the moneys were received in the prosecution of an unlawful undertaking. It is true that the trials of speed for money at the horse fair, and the selling of pools under the auspices of the association, were illegal; but there is no illegality in the promise, express or implied, of the defendant, to pay over to the plaintiffs the money received for them from whatever source derived, or from whatever transactions springing. In *Bronson Agricultural, etc., Association vs. Ramsdell*, 24 Mich., 441, the attempt was made to enforce the illegal contract by a suit to recover the moneys promised by it; but this suit involves no such attempt. The illegality of this association only appears incidentally in explaining whence the moneys were received; but the ground of recovery is that the moneys were received for the plaintiffs, and it is not material how or on what account they came to his hands, if in fact for the plaintiff's use, * * * *.”

43 Miss., 641.

Subject: Rule after Contract Consummated.

In the case of *Gilliam vs. Brown*, 43 Mississippi, 641, one of two partners engaged in traffic, admitted to be illegal and contrary to public policy, had possessed himself of all of the proceeds of the traffic, and the other sued for his share.

The last two propositions of the syllabus are as follows:

"9. ILLEGAL CONTRACT.—NEW CONSIDERATION. It is a general principle that if the contract grows out of an illegal act, a court of justice will not enforce it. But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act. A new contract resting on a new consideration, although in relation to property, respecting which there had been unlawful transactions between the parties, is not of itself necessarily unlawful.

"10. ILLEGALITY OF EXECUTED CONTRACT, NO DEFENSE.—It is well settled that after the illegal contract has been executed, one party in possession of all the gains and profits resulting from the illicit traffic and transactions, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law."

In the course of its opinion, the Court, pages 659 to 661, said: "The grave question is, where profit and gain has accrued from this unlawful traffic, and these gains are in the hands of an agent, can he be called to account in a court of law by his principal. If the plaintiff, W. T. Brown, permitted his brother J. C. Brown, to take his cotton into Memphis, and there convert it into money, does not the illegality, and legal turpitude imputed to the transfer and sale, so attach to the act and himself as a *particeps*, consenting to it, as that a court of justice will altogether refrain from adjudicating between the parties, on the ground that *ex turpi causa non oritur actio*. Generally those who violate law in their dealings with one another are left in precisely the condition they placed themselves. As to third persons, injured by their acts, courts are free to give full redress. Those who make the covinous conveyances, and other acts denounced by the statute of frauds and perjuries, are not permitted to apply to the courts for extrication from the consequences of their fraudulent acts, if the grantee prove false to the secret trust reposed in him. It is not disputed that a remedy

will not lie on the illegal contract itself. If J. C. Brown had obligated himself to carry W. C. Brown's cotton into Memphis and sell it, no suit could be sustained for a non-performance. But where the illegal adventure has been accomplished, and the money arising out of it is in the hands of J. C. Brown, or his legal representative, what law is violated, what rule of public policy is infringed, what encouragement is given to the violators of the law, by compelling him to turn over the money to his principal? If the sensualist makes provision for his cast-off mistress, is morality put to the blush by the act, would the legal tribunals frown upon such a contract? It is very aptly said by Lord Mansfield in *Hulman vs. Johnson*, Cowp. Rep. 343: 'The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake that the objection is ever allowed, but is founded on the general principles of policy, which the defendant has the advantage of, contrary to the real justice between himself and the plaintiff.' The ends attempted to be reached by the principle is to restrain and discourage a violation of law by withholding a remedy, founded on the illegal contract. Therefore, the law esteems a promise, made in consideration of future cohabitation, to be utterly void; yet a bond or deed made for past cohabitation is good. *Froninger v. McBurney*, 5 Cow. 253; Chit. Cont. 516. In the latter case, the offense against morals was already accomplished. The bond or deed was not the inducement that brought it about.

"The point is full of embarrassment and we have maturely considered it with a view of apprehending some principle that may reconcile the adjudications. The general principle laid down in a great number of cases is to this effect: That if the contract grows out of an illegal act, a court of justice will not enforce it. But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act. A new contract founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. *Armstrong v. Toller*, 11 Wheat, 269; *Craig v. Missouri*, 4 Pet. Rep.; *Roby v. West*, 4 N. H. 290; *Patterson v. Nicholas*, 3 Wheat, 204; *Wooten v. Miller*, 7 S. & M., 385.

"It has been observed that the test, whether a demand connected with an illegal act, can be enforced, is whether the

plaintiff requires any aid from the illegal transaction to establish his case. *Simpson v. Bloss*, 7 Taunt., 246; *Roby v. West*, 4 N. H., 290. Subjecting the case at bar to this test, and it is manifest that the demand of W. T. Brown, against his brother's estate, must be traced back to the illegal traffic in the cotton; putting the claim in the simplest form of speech, and it takes this legal form. There was no express contract that J. C. Brown would account and pay over to his brother the proceeds of the cotton passed through the military lines and sold, nor was there a subsequent promise that he would pay the money thus realized. It comes to this, then, that by his so removing and selling the cotton with the consent of W. T. Brown, the law implied a promise that he should pay for it. The law will never imply a promise where an express promise would be invalid, or would not be enforced. If J. C. Brown had made an express promise that he would take the cotton to Memphis, sell it, and pay the proceeds to his brother, such contract would have been an engagement to violate law and duty, and no suit could be maintained upon it. It is conceded that W. T. Brown had no right of action grounded on the refusal of J. C. Brown to comply with his agreement to remove and sell the cotton. But the other member of the fact is, that he will account for the proceeds. To allow a suit on this, would be to give effect to the illegal bargain. This is hardly, then, a case where a subsequent contract relates back and attaches itself to the original illegal act, for the only contract shown to exist, if any, is such as the law will imply."

And on page 664 the Court further said :

"So long as an illegal contract is, *in fieri*, in the course of execution, neither party can have a remedy grounded upon it, either for its specific enforcement, or for damages for any breach of it. *Russell v. Wheeler*, 17 Mass., 281; *Shuffner v. Gordon*, 12 East, 304.

"But the principle seems to be well established that after the illegal contract has been executed, one party in possession of all the gains and profits resulting

from the illicit traffic and transactions, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law, and therefore, the plaintiff, jointly interested in its profits and gains, cannot ground any claim to an account and share thereof. All the harm that can inure to the public by an infraction of the law, has already accrued; and it were to encourage hypocrisy and gross dishonesty to permit a party fresh from a violation of the law, to set up his own turpitude as a shield and protection against the division of the gains of the illicit business with one jointly entitled to share them.

“It is patent to observe the struggle of the courts, and a gradual advance to escape from the unjust consequences of the universal application of an acknowledged principle, and the distinctions, not always palpably suggested by a sense of justice, to except special cases. In the earlier cases, if the money (the fruit of the unlawful business) was deposited with a third person for the plaintiff, this was treated as a collateral contract, and he was not permitted to defend on the ground of the illegality of the original act. As put by Justice Buller on the broad premise, that the moment the money passed into the stranger's hands, he held it as trustee for the plaintiff. As stated by the Supreme Court in *McBlair vs. Gibbes*, 17 How. S. C., 236, an implied promise, arising out of the receipt of the money was a new contract not affected by the illegality of the original transaction. It was further enlarged or illustrated, as in the case of several engaged in stockjobbing gambling, when one paid all the losses and took from the other his obligation for his contributory part. All were implicated in the illegal act, and no third person intervened as stake holder or trustee. A further extension was made when one who had collected the winnings at a game of hazard was compelled to pay a moiety to his associate in the winning. After pushing the principle thus far, it were easy to afford relief to a partner against his co-partner who had taken to himself all the profits of a business forbidden by Legislative enactment. Within the range

of the same doctrine is embraced the case of him who confides his money or his property to another, to be embarked in an illegal traffic; after the dealings are over and the business ended; that the money realized shall be regarded as had and received for the plaintiff's use and an implied *assumpsit* to account for it.

"Whilst affording this relief the courts are not obnoxious to the imputation of giving effect to illegal contracts or encouraging immoral acts. In all these cases the violation of law has already been accomplished, and one party is found in possession of money which belongs to another, and no detriment can arise further by raising an *assumpsit* to pay it over to the principal.

"In some of the cases closest in analogy to the one under consideration the suits were in chancery. This can make no difference, for a court of equity will no more lend its aid to an iniquitous transaction than a court of law, and a plea of 'illegality' or *contra bonos mores* is just as available in the one jurisdiction as the other."

42 Am. St. R., 353.

Subject: Rule after Contract Consummated.

In *Martin vs. Richardson*, 42 Am. St. R., 353 (94 Ky., 183), the first and third paragraphs of the syllabus, as published in 42 Am. St. R., are as follows:

"Contracts growing out of illegal transactions—Lottery tickets.—One who purchases a lottery ticket in violation of law may recover the proceeds of a prize drawn by it from one who has collected such proceeds after having fraudulently obtained the ticket from such purchaser in exchange for another worthless lottery ticket after the former has drawn the prize."

"Contracts—Validity of when springing from illegal transactions.—If an act in violation of law is already committed, a subsequent agreement, which, though founded thereon, constitutes no part of the original inducement or consideration for the illegal act, is valid."

At page 356, Am. St. R., 94 Ky., page 190, the court said: "Instead of an 'agreement' between the parties, founded

upon alleged illegal acts, we have in this case an implied obligation raised by law to refund moneys fraudulently received and withheld. For other authorities to the same effect, see *Farmer vs. Russell*, 1 Bos. & P., 295; *Willson vs. Owen*, 30 Mich., 474; *Rothrock vs. Perkinson*, 61 Ind., 39."

"The Little Louisiana Lottery concern was, under the pleadings in this case, an institution operated under lawful authority, and the defendant, in presenting the ticket in question, and in collecting the plaintiff's money, may be regarded as acting as his agent, and as collecting for his use. The law implies an obligation to refund the money, which is subsequent to and disconnected with the alleged illegal acts of buying, selling, or exchanging the tickets."

It is clear from an examination of the cases, especially *Tennant v. Elliott*, 1 B. & P., 3; *Farmer v. Russell*, 1 B. & P., 29; *McBlair v. Gibbes*, 17 How., 232; *Martin v. Richardson*, 94 Ky., 183, 190; 42 Am. St. R., 353, 356; and *Gilliam v. Brown*, 43 Miss., 641-666, that an implied promise,—arising out of the receipt of the money from or the proceeds or results of an illegal contract, in contemplation of law, constitutes a new contract upon a new consideration, necessarily subsequent to the original contract and not affected by its illegality. The case last cited embodies a very able and philosophical discussion of this position, and it is hoped the Court will carefully consider it, if indeed it shall deem any extended examination of authorities necessary in the premises.

The statement of the doctrine in *Planters Bank v. Union Bank*, 16 Wall., 483-500 (part of paragraph 5 of syllabus), is also suggestive and admirable. "Though an illegal contract will not be enforced by courts, yet it is the doctrine of this Court that, where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it, may be a legal consideration between the parties for a promise express or implied, and that the Court will not unravel the transaction to discover its origin. * * * " On page 500, the Court, in reviewing the earlier English cases which originated the doctrine, says: * * * "We are aware that *Falkner v. Reynolds*

and *Petrie vs. Hannay* have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this Court * * *"; for which position only three cases are cited in the opinion, to-wit: *Armstrong v. Toller*, 11 Wheat, 258; *McBlair v. Gibbes*, 17 How., 233-236, and *Brooks v. Martin*, 2 Wallace, 70; but, see also the decisions of this honorable Court, in *Kinsman v. Parkhurst*, 18 How., 289; *McMicken v. Perin*, 18 How., 507; *Planters Bank v. Union Bank*, 16 Wall., 483-499-500; *Union Pac. R. R. v. Durrant*, 95 U. S., 576-8; *Armstrong v. Am. Exch. Bk.*, 133 U. S., 433-4, 466-7; *Farley v. Hill*, 150 U. S., 572, 575-6, and *Burck v. Taylor*, 152 U. S., 688. See also *Burk v. Flood*, 1 Fed. Rep., 541-548; *W. U. Tel. Co. v. U. P. Ry. Co.*, 3 Fed. Rep., 423-7; *Kingsbury v. Burrell*, 151 Mass., 199.

Opinion of Circuit Judge on Appeal.

It would appear that the learned Circuit Judge sitting in the Circuit Court of Appeals failed to distinguish the real principle to be deduced from the authorities bearing upon this point and to apply it fairly to the complainant's case. On pages 141-142 he says:

"In that case (*McBlair v. Gibbes*), and in all the quotations cited to support it, the cause of action was not the illegal transaction, the void act, but a subsequent independent contract which the law raised. The difference is between enforcing illegal contracts and asserting title to money derived from them. * * *

"In the case at bar the entire cause of action is on the agreement, which is void through public policy. The complainant depends altogether upon that agreement, and seeks to set aside everything that has been done, and to enforce the specific performance of that agreement. He ask the Court to 'enforce this illegal contract, and requires the aid of the illegal transaction to establish his case.'

"It follows that the contract under consideration can neither be enforced nor made the basis of any relief in a court

of equity. The maxim *in pari delicto* applies. The Court will leave the parties to such a contract precisely where it finds them. * * *

We respectfully submit that the learned circuit judge is in error. The authorities above cited and discussed show our understanding of the doctrine, and the doctrine especially of this honorable court, upon this subject. While the basis of recovery in such cases is indeed what the learned circuit judge terms a "subsequent independent contract":—it is neither necessarily nor usually an express contract, nor is it a new contract except that as implied, it must necessarily supervene after the illegal contract has been executed by the parties themselves. The mere fact, however, that the parties expressly agreed to a fair division certainly will not weaken the claim of either to such division—*i. e.*, the law which in such circumstances would imply a promise to divide will certainly not refuse to enforce an express promise and agreement between the parties to this effect, as was said: *Gilliam vs. Brown, supra*. "The law will never imply a promise when an express promise would be invalid, or would not be enforced."

It is true that the complainant's bill is not very appositely or felicitously drawn to avail of the relief contemplated by the authorities cited on this branch of the case; yet, while it does ask specific performance of the contract, it does not ask the aid of the Court as to the illegal object of it, if any; it does not ask the Court to compel the defendants to unite with the complainant in the joint effort pledged in the contract to secure the grant of the franchise. No, the contract, *i. e.*, the essential object of it, has already been fully executed and accomplished by the parties, the franchise has already been obtained from the Legislative body, and the illegality, if any, is a thing of the past; but Sheild (and his associates, having full knowledge in the premises), hold the complainant's share of the result, and the bill does ask for an accounting and for general relief,—in terms, "that all proper inquiries may be made, accounts taken and decrees entered; and your orator further prays that he may have and be granted such other, further, gen-

eral and complete relief as may be agreeable to equity and the nature of his case."

Opinion of District Judge on Appeal.

Upon this branch of the case, the learned District Judge expresses himself as follows (but we desire it to be specially noted that he does not feel that the doctrine involved is necessary to the solution of the case at bar, *i. e.*, he holds that the contract between the parties is clearly *not* violative of public policy, which is also distinctly our position), pp. 144-145, printed record :

" * * * I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp vs. Taylor*, and approved in *McBlair vs. Gibbs*, and *Brooks vs. Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the franchise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the Court is not sought to enforce it, nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed, one of the parties is in possession of all the fruits, and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits.

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter, on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract, of his own seeking, on the ground that it

was immoral, and, therefore, that he has the right to make off with the swag."

In *Bly v. Second National Bank of Titusville*, 79 Penn. St. R., 453, the action was upon a note and the defense usury. On page 456 the court, in discussing the rule that courts will not aid one whose cause of action is founded on an immoral or illegal contract, said :

"The rule has sometimes been carried to inconvenient lengths, not because of its unsoundness in itself, but in its application to particular cases. It should be rigorously applied to all unlawful transactions, but not extended so far as to encourage violations of contracts for payment of honest debts as between the parties, because they grow out of tainted originals. If the taint of the original vitiated every contract growing out of it, however remotely connected with it, it would give protection to fraud upon individuals without compensation in the benefit of the public."

We know not how better to close the discussion under this general head of "public policy" than—by adding to these philosophical and balanced words the yet more impressive and memorable declaration of Sir George Jessel, in *Registering Co. v. Sampson*, L. R., 19 Eq. Cases, p. 465, already above quoted :
 " * * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice :—and then, by placing along side these two expressions of the majestic morality of the law, the golden utterance of Lord Watson, in the House of Lords, in *Nordenfelt v. Maxim Co.*, 1 L. R., App. Cases (1894), 535, 552— * * * But it must not be forgotten that the community has a material interest in

maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade."

Though not perhaps in all respects strictly apposite, it may serve yet further to illustrate the lofty indignation, and the irresistible effect of that indignation upon the judgment, of a great English jurist, to quote what Lord Macnaghten said in the same great case (1st. App. Cases, 573), in commenting upon the case of *Whittaker v. Howe*, in which the facts were that the defendant had sold out to the plaintiffs his large and lucrative practice as a solicitor, accompanied by a covenant that he would not practice on his own account either in England or in Scotland. When sued for the breach he pleaded that his contract was void, being in restraint of trade as "*against public policy*." Lord Macnaghten says:

"I cannot think that *Whittaker v. Howe* requires much explanation. * * * * * He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practice on his own account in England or Scotland. In order to hold the business together his name was kept in the firm and he remained in the office, drawing a handsome salary. Then there was a quarrel; and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighborhood, and he tried to steal the business he had sold. His defense was that a covenant so wide was against public policy. But it did not occur to him to return the price; that he kept in his pocket. Lord Langdale thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honorable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act: Would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? * *

* * Lord Langdale held, on the evidence before him, that

the restraint was not unreasonable, although it extended to the whole of England and Scotland."

It is noticeable that in the Nordenfeldt case itself, so great, so resistless, was the pressure of morality against the arbitrary and technical rules of the law, that the House of Lords held the collateral covenant Nordenfeldt had given to the Maxim Company, to whom he had sold the right to manufacture his marvellous gun, to be reasonable and valid, although it restrained the original inventor and patentee from manufacturing the gun anywhere throughout the known world.

We have above conceded, at least by implication, that the strictures of Lord Macnaghten upon the conduct of Howe might not be entirely appropriate to the conduct of the defendant in the case at bar; and yet, when it is remembered that this case is being tried upon demurrer, that the only conclusion legally warrantable from the facts, so far as yet developed, is that the defendant in open violation of the provisions of express contract, faithfully executed on the part of the plaintiff, have not only defiantly refused to comply on their part, but have brought forward, as the chief excuse for this refusal, what the greatest judges who ever set upon the English bench have characterized as "a mean defense," and what is undeniably a confession of equal guilt combined with a claim to hold all the profits of the wrong doing:—we say, when these features of this case are recalled, we are content to leave it to the Court to make its own application of the indignant sarcasm of the great Law Lord.

We submit the case upon the Public Policy defense.

REMEDY AT LAW.

Has the complainant a plain, adequate and complete remedy at law?

This is the second and only other real and live question before the Court.

In attempting to answer it, let us first enquire :

I.

WHAT IS THE COMPLAINANT'S CASE?

WHAT EQUITABLE FEATURES DOES IT PRESENT?

WHAT ARE HIS RIGHTS AND WRONGS OF WHICH LAW WILL NOT AFFORD HIM REDRESS OR REALIZATION AND RELIEF AS PLAIN, ADEQUATE AND COMPLETE AS EQUITY?

We insist that his essential rights are Specific Performance and Accounting as incident thereto: Specific Performance of the contract of August 9th, 1895, so far as the same is yet unexecuted—i. e., so far as involves the complainant's rights under said contract to a one-half interest in and ownership and control of the Traction franchise and enterprise. Upon a view of the plaintiff's entire case as it stands before the Court on demurrer, there would seem to be no reasonable or substantial doubt as to this.

The defendants, on the other hand, contend that this is neither the exact phraseology nor yet the fair construction of that contract, which, in terms, is nothing but an agreement

The decree of the Trial Court (pages 119-120, p. r.) dismissed complainant's bills without any reservation whatever. The decree of the Circuit Court of Appeals, affirming said decree, provides (page 146, p. r.) that—"it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause, be, and the same is hereby, affirmed, without prejudice, with costs."

It is respectfully submitted that the words—"without prejudice," in the connection thus used, do not reserve to the complainant the right to sue at law.

“to divide equally * * * whatever may be realized from the enterprise”—realized, probably, by a speculative sale of the franchise and division of the proceeds: that this contract, looking only to and providing only for a division of money profits, a violation of it sounds only *in damages*: and therefore Law is the natural and exclusive forum for the trial. They further contend that, at the least, the wording of the contract is not plainly in harmony with our views, and that a contract *not certain in its provisions cannot be specifically enforced*.

Meaning, Substantial Certainty, and Mutuality of the Contract of August 9, 1895

But how is the true meaning of a contract to be determined? Manifestly, the rule requiring “certainty” in the terms of a contract, to entitle the parties to specific performance of it, does not intend such certainty as to exclude all use of the ordinary canons of construction: for these canons are constantly applied by the courts in determining the proper construction of contracts of which specific performance is enforced.

The just and true construction of a contract is often best arrived at, and its meaning best understood, by reference to the circumstances in which it had its origin, *i. e.*, by letting the Court into the situation of the parties at the inception of the contract—as also by the contemporaneous construction of their contract by the parties themselves.

We do not claim that Hyer’s construction of what the contract of August 9th entitled him to, is admitted by the demurrer or binding upon the Court as the sound legal construction; but if, before Hyer had any contract with Sheild or his associates, he intended and proposed to build the Broad street road, and was preparing to do so as best he could, when he met Sheild, then this fact has a pregnant bearing upon the question what the parties meant by the language employed in said contract of August 9th. Unless some reason is given for a different view of the matter, there is every reason to infer that Hyer’s con-

nection with and interest in the Traction franchise and enterprise, under his contract with Sheild, was of the same nature as his connection with and interest in the Conduit franchise and enterprise prior to that contract. The facts as to the history of his Conduit franchise and enterprise, and his relations to it, are set out in the plaintiff's bill, and these facts must be regarded as admitted upon demurrer, and their force and bearing as above set out cannot be denied. So what Hyer said and did under and in connection with the contract of August 9th, and what he alleges that Sheild said as to his understanding of that contract—are facts, and must be admitted by the demurrer. Even the claims which Hyer put forth, as to his rights under the contract of August 9th, "*dam ferret opus*," while they are not admitted by the demurrer to be valid, and cannot, of course, override the court's construction of the contract, yet they are facts, and as such, have an important bearing upon that construction.

It may be well to add that where, as a matter of pleading, it is necessary to charge a certain purpose and intent—*c. g.*, the intent in a grantor to "hinder, delay, and defraud creditors or other persons," there, the charge of such purpose and intent is the essential thing, and while the demurrer does not admit its truth so as to preclude subsequent denial and contest, yet the truth of such charge—upon demurrer—is admitted, *in so far as requisite to give the Court jurisdiction.*

Note, then, what the plaintiff says of these matters in his bill: *c. g.*—in the last paragraph, on page 4, as to the inception of the Broad street project in his own mind—on pages 5 and 6, that, "He had given substantial and satisfactory guarantee, indeed precisely the guarantee required, of the good faith of himself and his associates of the Richmond Conduit Railway Company and their earnest purpose to build the road";—at the top of page 7 that, "During the early part of August, 1895, your orator was in the city of New York, engaged in perfecting his arrangements for prompt and vigorous action under his Conduit ordinance, as soon as it should be satisfactorily amended:"—on page 10, "Sheild stating sub-

stantially that it was an agreement providing for a consolidation of interests; each party to have equal ownership and control in the enterprise and an equal share of profits;”—on page 11, concerning the arrangements between the parties as to the names of the incorporators; on page 13, that, “he was detained one day in New York, in perfecting his preparations for vigorous prosecution of the joint enterprise,”—on page 16, his published “Interview” states “that he had a contract with the Traction Company for one-half interest of their franchise, when such franchise was granted;” and on page 20, his formal “Notice” “claims to be entitled to a full one-half interest in the franchise.”

Can any unprejudiced mind, viewing the case as it must be viewed upon demurrer, doubt that Hyer’s idea and purpose all along, were to build the Broad street road, or that he sustained to the *Conduit franchise and enterprise*, in the fullest measure, the relation of permanent interest, ownership, and control? And what is there to show that his relation to and interest in the *new* franchise and enterprise were different? Of course, the amount and proportion of his interest were lessened one-half; but we insist that this is the only change which can reasonably be inferred from the history of these transactions and from the face of the bill. There can be no sort of difficulty therefore in arriving at the contract of which the plaintiff claims and asks specific performance.

If we have no rights, there is an end of the discussion. But, what if we were and are *justly entitled* to the rights we claim under the contract of August 9th, 1895? And what if (as is undeniably true), the defendants were, repeatedly and fully and in good time, *notified* of these claims and rights? And what if (as is further undeniably true), the defendants, thus notified, contemptuously scouted our claims; either taking the chances that they would turn out to be baseless, or relying upon the very argument and appeal which they are now making before this Court, to-wit: that it is inconsistent and unconscionable in the plaintiff to claim an interest in the franchise

and yet seek to undo and destroy what has been done in execution and development of it.

If what the Traction Company and its promoters have done—in the way of subscription to and issue of stock, organization and action of the Company, execution of bonds and creation of incumbrances securing them—is *to stand*, without regard to the question *whether or not the plaintiff has rights* which will thereby be denied him; why then of course these rights are gone, and we ought, at once humbly to beg pardon for complaining at all before a Court of Equity. To our humble comprehension, therefore, it would seem to be merely a question *whether or not we had and have rights in the premises, and whether we gave due notice of them*, and, in this connection it must be remembered that, most if not all the things done by the defendants, have been done not only *after notice given*, but actually *after bill filed and process served*.

Certain parts of this contract of August 9th, would doubtless have proved, if the attempt had been made, very difficult to enforce. Co-operation in a partnership enterprise is an awkward thing to compel, but neither side, in the case at bar, has asked anything of the sort, for the very good reason, that before the bill was filed, the co-promoters and contracting parties had succeeded in the objects of their co-operative effort, to-wit: procuring a franchise for the construction of a street railway on Broad street, in the city of Richmond, Virginia. But, the basis of the antecedent considerations upon both sides being complied with, one side was and would have been equally as compellable as the other to let that other into a one-half interest in the franchise and enterprise. It was not properly a contract upon Sheild's part that he would give Hyer a one-half interest in his Traction franchise (at the time he had none) if Hyer would do certain things. They met as equals; both were to co-operate, and certain specific services were to be and were rendered by Hyer; but beyond this co-operation and these services, Hyer and Sheild, each for his side, agreed that they would share equally in the enterprise. Neither side ac-

cuses the other, so far as the record shows, of any failure of co-operation. No such phase of the agreement is before the Court. We come then to *the contract obligation, which we do ask should be specifically enforced.* What was it but a contract of equals that they would share equally? If Hyer had eliminated and excluded Sheild from participation in the partnership enterprise, the contract of August 9th, would have been just as enforceable in Sheild's behalf as we claim it now to be in Hyer's.

The contract of August 9th shows upon its face that we were required to furnish, and did furnish, the \$10,000 deposit, which was the basis of the Traction Company's application for its franchise; and also that the Traction side of that contract regarded itself as having entered into the benefit of the labors and the outlay of both sides anterior to the contract.

Failure to Subscribe to Stock.

We certainly are not to blame for not having hitherto subscribed, or offered to subscribe, to the stock of the Traction Company. That stock was all taken (at least nominally) before we ever knew that the subscriptions were desired or could be made. Indeed, it sufficiently appears from the record that no subscriptions were desired from our side, and that none would have been received. The amended and supplemental bill makes the following charges in this regard (pages 99-100 p. r.):

Extract From Bill.

"Your orator has been informed and believes and therefore charges that, prior to and at the time of the said subscriptions, each, all and every of the said subscribers for the capital stock of the said company had been put upon inquiry as to the rights of your orator afterwards set out in his original bill, and inquiry by them, or by either of them, would have disclosed to them, and to each of them, all the facts afterwards set out in said bill: that, indeed, each, all and every of the aforesaid subscribers had actual notice and knowledge of all your orator's

said claims and rights, as afterwards set out in his said original bill, at the time of and prior to their said subscription.

“ And your orator now further and distinctly charges that said subscriptions were made without his knowledge, without notice to him of said meetings, or of said subscriptions; without any opportunity to him to subscribe to the capital stock of said Richmond Traction Company, and with the design of excluding him from any opportunity to subscribe for any part of the said capital stock, and with the purpose of excluding him from any participation in the stock of said company, or its organization, or the determination of its policy.

“ Your orator has been further informed, believes and therefore charges, that no payment whatever was actually made at the time of subscribing or at any time subsequent thereto, by any or either of the said subscribers, for the capital stock of the said company; that any pretended payment in money or by checks or otherwise made at any time or in any form by said subscribers or by any or either of them, for the said capital stock or any part thereof, or any pretended passing of a consideration of any character to the said Richmond Traction Company, from the said subscribers or any or either of them, in payment for the said stock or any part thereof, were fictitious, and were wrongful and unlawful attempts to evade the laws of this Commonwealth; and your orator has been further informed, believes and therefore charges that, since the time of their said subscriptions and without any lawful or valid payment from the said subscribers, or either of them, certificates, purporting to be for fully paid up stock of the said company, have been wrongfully and illegally issued to the aforesaid subscribers for the amounts of their respective subscriptions.”

What we claim is, that the franchise be disencumbered of all that has been put upon it without our concurrence and to our prejudice. When this shall have been done, then the parties to the contract of August 9th must have an equal voice in the course to be pursued, the amount of stock to be issued, how to be paid, and then to the receiving of sub-

scriptions in a legal manner and with due regard to the contract rights of each side to subscribe. It may be well here emphatically to state, that we never claimed to be entitled to paid up stock of the company, without in some legal and proper way paying for it.

Defendants' Position a Mockery of Justice.

It would be a mockery of justice and of the dignity of the Courts, if one party to a contract, after being served with notice of the rights and claims of the other party thereto, and even after being served with process in a suit brought to enforce these rights and claims, were to be permitted deliberately to place himself in a position where specific execution of the contract would be very inconvenient to him, and then be heard to plead that the remedy by specific performance should not be enforced, because his "situation" was such that the remedy would prove "harsh and oppressive."

If it be replied :—But, we were compelled to proceed at once to carry out our franchise under penalty of forfeiting it, then we rejoin :—It nowhere yet appears upon the record, what the situation of the company really is: therefore demurrer is not the stage of the cause, at which to make a test of this defense; besides, having gone on, after notice of the defendants' claims, upon the theory that they were without foundation and upon the statement that you had looked into the matter and were entirely willing to take all the risks, you must now stand all the legitimate consequences of the fullest realization of whatever rights it shall turn out the plaintiff was at the time entitled to.

The more we examine the case the better we are satisfied, not only that the contract of August 9th, 1895, embodies every essential requisite to entitle the parties to a decree of specific performance, and that such a decree is practically the only remedy the plaintiff can have, which will even approach adequacy and completeness, but, also, that the defendants, at this stage of the cause, at least, are in no position to resist the entry

of such a decree, having introduced no evidence to show that or how they would be damaged by specific performance of their contract to divide with us—indeed, having, as yet, not even made the point in pleading.

II.

The Law as to Jurisdiction in Equity.

The accomplished Judge, who sat in the trial court, declared in his opinion, filed August 5th, 1896, record pages 116-117, that the complainant was rightly in a Court of Equity. Speaking of defendants' demurrer to complainant's bill, as last amended, this able jurist said :

"The third reason assigned is that the complainant has a plain, complete and adequate remedy at law, if any he has, against the defendants in the case made by the bills. I (do) not concur with counsel for the defendants in the argument submitted on this point, and, so far as it is concerned, the demurrer must be over-ruled. In my judgment, in cases of this character, where specific performance is claimed, complete and adequate remedy can only be had in a Court of equity."

The rule is stated in Story's Equity Jurisprudence as follows:

"33. Perhaps the most general, if not the most precise, description of a court of equity, in the English and American sense, is, that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at

the present time, and in future; otherwise equity will interfere, and give such relief and aid, as the exigency of the particular case may require." * * *

3 Peters, 213.

Subject: Jurisdiction in Equity.

In the case of *Boyce's Executors vs. Grundy*, in 3 Peters, 213, the Supreme Court of the United States said:

"This Court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

21 How., 582.

Subject: Jurisdiction in Equity.

In the case of *Barber vs. Barber*, in 21 Howard, page 582, the same Court said:

"We observe, in confirmation of what has just been said, that the jurisdiction of the courts of the United States is derived from the Constitution, and from legislation in conformity to it. The first limitation by the latter upon jurisdiction of the equity courts of the United States is, that no suit can be sustained in them, where a plain, adequate, and complete remedy may be had at law. The Court has said: 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficacious to the ends of justice, and its prompt administration, as the remedy in equity.'

Boyce's Ex'r v. Grundy, 3 Pet., 210; *United States v. Howland*, 4 Wheat., 108; *Osborne v. United States Bank*, 9 Wheat., 841, 842. * * *

5 Wall, 78.

Subject: Jurisdiction in Equity.

In the case of *Watson vs. Sutherland*, 5 Wall., page 78, the Court said: "It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, 'but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to ends of justice, and its prompt administration as the remedy in equity.' * * *

15 Wall., 228.

Subject: Jurisdiction in Equity.

In the case of *Oelrichs vs. Spain*, 15 Wall., page 228, the Court said: "The 16th section of the Judiciary Act of 1789 provides, 'that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law;' but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate, and complete;' or, in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration' as the remedy in equity."

130 U. S., 514.

Subject: Jurisdiction in Equity.

In the case of *Kilbourn vs. Sunderland*, 130 U. S. 514, the Court said: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. * * *

91 Virginia, 688.

Subject: Jurisdiction in Equity.

In the recent case of *Stuart vs. Pennis*, 91 Va., 688, the Supreme Court of Appeals of Virginia said: " * * * While the

doctrine is well established that a court of equity will not, in general, decree the specific performance of contracts relating to chattels, yet it will do so where the remedy at law is inadequate to meet all the requirements of a given case, and to do complete justice between the parties.

"The true equity rule is thus laid down in Story's Equity J., sec. 33: 'The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate for, if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time, and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require.'

"The remedy at law would fall short in the case at bar, of measuring up to this rule. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. *Where the fulfilment or execution of a contract may extend through several years, it would be difficult to estimate the damages. His profits, depending in such case on future events, could not be estimated in present damages without being largely conjectural. As is said by Pomeroy in his book on Contracts, sec. 15: 'To compel a party to accept damages under such circumstances is to compel him to sell his possible profits at a price depending on a mere guess.'*" (Italics ours.)

Damages practically no remedy in the case at bar.

Could language be more appropriately impressive than the words last quoted, which we have printed in italics? In their first brief filed upon the argument of the demurrer in the Circuit Court, the defendants' counsel say, of the contract of August 9, 1895:

"If it entitles the plaintiff to anything, it entitles him to a certain sum of money, represented by one-half of the profits

of the Traction Company, realized during its existence, to-wit, from 28th August, 1895, the date of the city ordinance, to 1st January, 1926."

The learned counsel are right—the profits upon the enterprise contemplated by the contract aforesaid, depending, as they evidently do and must, upon the character of the construction, equipment and management of the Traction road, will not be legally or practically determinable prior to the date last mentioned, to-wit: the expiration of the Traction franchise, January 1st, 1926. See record, page 25.

When the plaintiff instituted his suit, all these things were in the womb of the future, as the greater part of them still is to-day. Manifestly, then, the question of profit or loss upon the enterprise is still dependent upon the question whether or not the management and operation of the road are and will continue to be competent, practical and economical, or the reverse.

Who, even to-day, can answer this question? Much less could any intelligent answer have been given to it two years ago, when the contract of August 9th was violated and repudiated by the defendants, and the plaintiff found himself compelled to take action to protect and enforce his rights.

The attempt to compensate his wrongs by money damages would not only be a denial of the plaintiff's most essential rights; but he must either now accept an utterly conjectural estimate, or wait until the expiration of the corporate life of the Traction Company to sue for his possible (equitable) share of the possible actual profits of the enterprise. It is manifest that neither of these alternatives will afford him any real remedy or relief whatever.

Community of Interest : Partnership.

The Contract of August 9th, 1895, created a partnership relation between the parties thereto and affected thereby ; and in cases of this character the remedy at law is inadequate.

93 Virginia, 214.

Subject : Partnership.

In the case of *Jones v. Murphy* decided by the Supreme Court of Appeals of Virginia, June 11th, 1896, 93 Va., 214, Cardwell, J., delivering the unanimous opinion of the Court (pp. 215, 218), said :

"This is an appeal from a decree of the Chancery Court of Richmond city, and the case grows out of the following agreement :

"This agreement, made and entered into this 2d day of November, 1889, between Merriwether Jones, of the first part, and S. S. Murphy of the second part.

"Witnesseth : That the Clover Hill Mines and mining property, and (the) land of the late Franklin Stearns, both situated in Chesterfield county, Virginia, have been put upon the market ; and the parties to this agreement have agreed that each shall use his best endeavors to sell the said lands, as a whole or in part, and that each of the parties hereto shall receive one-third of the money or other consideration paid, or to be paid for said property above the actual cost paid to the owners, either as a profit or as commissions. The remaining third is hereby agreed to be paid to James R. Werth, Esq. The necessary travelling expenses are to be deducted out of the net consideration or profits.

"(Signed) MERRIWETHER JONES.

"(Signed) S. S. MURPHY."

* * * * *

(P. 218). "The demurrer raised the question of equity jurisdiction only, and appellant insists that the demurrer should have been sustained on the ground that the complainant's bill did not make a case for equity jurisdiction. We are of opinion that the demurrer was properly over-ruled, as the bill upon its face shows that the agreement under which the parties had

acted made them partners; that there were partnership accounts between the parties which were properly to be stated and settled by a Court of Equity, and that the remedy of the complainant was not complete at law.

"In order that persons may be partners in the legal acceptance of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term. 1 Lindley on Partnership, p. 1; Story on Part., sec. 2; *Davos & Co. v. Hoover & Co.*, 25 Fla., 727; *Lengle v. Smith*, 48 Mo., 276; *Cothran v. Marmaduke & Brown*, 60 Tex., 370.

"In the last named case it was said that it is not essential to constitute a partnership, that the parties are by agreement to share in the losses of the business; it is sufficient if they are to have a community of interest in the profits as such, and that where a party to the agreement was entitled to an interest in the profit, this would entitle him to an account to ascertain the result of the enterprise.

"In the case of *Lengle v. Smith*, *supra*, the parties entered into an agreement by which the one was to furnish the capital, and the other his services, the profits to be divided between them, and no special contract was made as to the losses, and it was held that they were partners, and that a Court of Equity was the proper Court for either party to apply to for a settlement of the partnership accounts.

"In the case here the agreement between the parties contemplated and provided for the selling on commission, or the purchase and sale at a profit, of several tracts of land (eight of which were in fact sold to Dininy), which agreement was indefinite in its continuance, the deduction from the net profits, whether these consisted of money or land, of the expenses of

the parties, and the division of these net profits thus arrived at, into three equal parts, one of which was to go to Jones, one to Murphy, and one to Werth. These lands were not to be sold all at once, but could be sold as they were, part at one time and part at another. It provided, in fact, for a series of transactions, involving expenditure of time, skill, and expense by the parties. The parties to the agreement being partners, and the bill showing that of necessity there were accounts to be taken to ascertain the result of the enterprise, the remedy of the complainant was only complete in a Court of Equity.

“In the case of *Smith v. Marks*, 2 Rand., 452, this Court said: ‘The principle of interference is, that courts of law either cannot give a remedy, or cannot give so complete a remedy as equity.’”

27 Southeastern R., page 432.

Subject: Partnership.

In the case of *Stringfellow vs. Wise*, decided by the Supreme Court of Appeals of Virginia, April 15th, 1897, and reported in volume 27, Southeastern Reporter, page 432, &c., Cardwell, J., delivering the unanimous opinion of the Court, at pages 433 and 434, said:

“The Judge” (meaning the judge of the lower court) “held that an agreement between plaintiff and the defendants looking to the formation of a limited partnership was entered into the 23rd day of February, 1891, but was never consummated: that, in anticipation of the consummation of such a partnership, transactions were had on account of the proposed partnership, and advances in the shape of labor, materials, and money made for the use and benefit of the proposed partnership, and certain property and property rights were acquired by it; that, though plaintiff and defendants might be liable as partners to creditors, if any there were, yet as between themselves no partnership actually existed, but their rights, growing out of advancements and labor for the benefit of the proposed partnership, would have to be settled between themselves upon

principles analagous to those adopted in winding up a common law partnership, and the partners themselves would have to be put, as far as possible, in statu quo. To this end the decree of the court appointing a receiver in the cause theretofore entered was set aside, upon the condition that the defendants enter into bond, in the penalty of \$1,000, conditioned to restore to plaintiff any property in kind that may have come into their possession, and to pay to plaintiff any sum that might be found due from them, or either of them, to him, upon the settlement of the accounts directed, and the following accounts were directed: An account of the advancements made by either party in money, labor or materials for the benefit of the proposed partnership, and the value thereof; an account of any property acquired or profits from business made by the co-operation of the said parties in the use of the property or means contributed; an account of all property contributed by either of the parties in anticipation of the proposed partnership which remains in kind, together with its value and the value of its use, and any damages which may have been done it in such use. This decree also perpetuated the injunction so far as it restrained the defendants from using the firm name of Wise, Long & Stringfellow, and dissolved it in all other respects."

* * * * *

"We are of opinion that the decree of October 10, 1894, correctly settled the principles of the cause, and that no injustice was done the plaintiff thereby."

See also: *Canada vs. Barksdale*, 76 Va., 899.

As to the exact form of Relief to be given: this is really not a matter to be considered upon demurrer, at which stage of the case the question to be decided is—whether the plaintiff be entitled to *any relief* upon his bill? When the facts are fully developed it will be time enough to arrange the details of the relief, and we have done our part in preparation for the entry of a decree giving complete and adequate relief, by bringing before the Court all whom we conceive to be in any event lia-

ble to us; so that the entire matter may be equitably adjusted, according not only to our equities against them, but to their equities as against each other.

Respectfully Submitted,

ROBERT STILES,

ADDISON L. HOLLADAY,

Solicitors and Counsel

for Petitioner L. H. Hyer.



APPENDIX.

The ten grounds upon which the defendants base their demurrer will be found listed on pages 114 and 115 of the printed record. As repeatedly stated in the argument of the cause, both oral and printed, only two of the ten, *i. e.*, grounds III and IV, present questions of any considerable interest or difficulty, and these have already been considered in the brief proper, to which we append—merely out of abundant caution—a brief examination of the remaining eight points, or rather seven only; for a glance will satisfy the Court that grounds I and III (as to remedy at law) are identical.

There remain, then, to be herein briefly considered, as per list referred to, grounds II, V, VI, VII, VIII, IX, and X.

These grounds of demurrer, as we understand them, will be briefly stated, in substance, as hereafter considered.

Ground II of Demurrer.

DEFENDANTS SAY THAT THE CITIZENSHIP OF THE PARTIES BARS THE JURISDICTION OF THE COURT.

This position is so evidently without merit as to have been openly abandoned by counsel, as will appear from the opinion of the Honorable Circuit Judge who presided in the trial court. See record, bottom of page 16.

Ground V of Demurrer.

DEFENDANTS SAY THAT THE BILL IS MULTIFARIOUS AND DE-

FECTIVE, FOR *misjoinder of other defendants* WITH THE DEFENDANT SHEILD.

To which we reply.

1. If any of said defendants be not indispensable parties, their presence may be dispensed with, without affecting the validity of the suit or the jurisdiction of the Court.

2. The bill alleges that Sheild had power of attorney to represent, and did represent, all the parties interested in the Traction scheme at the date of the contract of August 9th, and that all other parties, if any, becoming interested after that date, were put upon inquiry by what occurred—indeed had full notice and knowledge of the plaintiff's rights.

The bill itself embodies interviews and notices calculated to inform all parties interested as to these rights and claims, and shows yet further that the gentleman who is now President of the Traction Company, before the passage of the Traction ordinance, received and publicly acknowledged such notification, and answered the same by avowing thorough examination of Hyer's claims, and by denial and repudiation of them.

3. These parties defendant (other than Sheild), and especially the Traction Company, are proper and even necessary parties, *because they claim an interest in and have possession and control of the subject matter of the suit*, to-wit: the Traction franchise. This fact alone is sufficient, under the fundamental rule determining who should be made parties to proceedings in equity, to require and compel the plaintiff to summon these parties to enter the suit, for the protection of their own rights as well as the realization of his; and

4. These parties defendant, and especially the Traction Company, are bound by the contract of August 9th, 1895. Bound, be it observed, especially the Traction Company, *not* upon the basis of *express contract* made with the Company through the agency of the promoters; *nor* yet upon the theory

of *ratification* by the Company, after it came into existence, of such antecedent contract; *but* rather upon the basis of *equitable* estoppel, implied adoption of the burdens of the contract, by knowingly availing itself of its benefits.

Lord Cottenham discriminated and defended his three or or four great decisions which first applied this doctrine in cases such as that at bar. Courts and text-writers alike, recognize and approve this distinction, and the equitable basis thus laid down for the liability of a company for specific performance of contracts made by its promoters before it came into existence.

The defendants' cited in the lower courts in support of their position, 1 Morawetz on Corporation, Section 547, which is in these words :

"Sec. 547. *Liability of a corporation for the Acts of its Promoters.* A Corporation is not responsible for acts performed, or contracts entered into, before it came into existence, by promoters or other persons assuming to bind the Company in advance. It is clear that the corporation cannot, in such case, be held liable on any principle of the law of agency, for an agency implies the existence of a principal and a delegation of authority from the principal to the agent."

But, our friends failed to read all this philosophical author had to say upon this subject. Only two sections below, occurs the following passage :

"The adoption of an agreement made by the promoters of a corporation may often be implied from the acts or acquiescence of the corporation or its agents, without any express acceptance. After a corporation has knowingly received the benefit of an engagement entered into by its promoters, it will usually not be permitted to deny that it agreed to assume the corresponding burdens."

"A corporation cannot be charged with the acts or contracts of its promoters, by virtue of the technical doctrine of ratification." Sec. 549, pp. 524-5.

In support of the position taken in this latter passage, the

learned author cites, amongst other cases, the decisions of Lord Cottenham above referred to, which have undoubtedly been much discussed and critized, but, as grounded and limited by the great Chancellor himself, they have never been, will never be overruled or repudiated.

Two other authorities cited upon this point in the lower courts by the defendants, to-wit: *Franklin Ins. Co. v. Hart*, 31 Md., 59, and *Abbott v. Hapgood*, 150 Mass., 252, do not advert to this distinction. But the Massachusetts case raised the question whether the Company or its projectors should sue upon a contract made by the projectors before the Company came into existence. The Court held that the suit should be brought in the name of the projectors, and not of the Company; but added that every one concerned in the case must have known that the projectors, and not the corporation, made the contract. The Maryland case held that one could not be validly appointed secretary of a corporation before it had any existence, and therefore could not have a valid claim for salary as such; but the following extract from the opinion is suggestive: "The appellee has no right of action and cannot recover against the corporation, for services thus rendered or under an appointment thus made, prior to its existence as such; unless it has in some way become legally bound therefor, and of this there is no evidence." Manifestly, the corporation, after it came into existence, took no benefit from the services rendered by the *quasi* secretary, "prior to its existence as such."

The defendants also cited 1 Thompson on Cor. ss. 480-481. It is difficult to see with what view, except that the latter section mentions with approval cases holding that "an agreement by individuals that, when they become incorporated, they will give the other contracting party a certain amount of paid up stock of the corporation" is not binding upon said corporation when it is organized—a doctrine which in no way affects the case at bar. But, it is important to note that Thompson precisely agrees with Morawetz, in his statement of the law upon this subject, the opening clauses of section 480, of Thompson corresponding with section 547 of Morawetz, and

the last clause of section 480 of Thompson, in these words,—
 “So it may, of course, impliedly ratify such engagements, by accepting and retaining any benefit which accrue to it therefrom, in which case it becomes liable, not on the strict theory of contract, but on the principle of *estoppel*,” answering closely to section 549 of Morawetz.

Both these learned authors cite, in support of the equitable liability of corporations upon these antecedent promoter contracts, the leading decision of Lord Cottenham, to-wit: *Edwards vs. Grand Junction R'y Co.*, 1 My. & Cr. 649, the syllabus of which is as follows:

“An incorporated Company will be bound by the agreement of its individual members, acting before incorporation in its behalf, if the Company has received the full benefit of the consideration for which the agreement stipulated on its behalf.”

On pages 671–2, the Lord Chancellor thus states the grounds of his decision:

“But then, the railway company contend that they, having now become a corporation, are not bound by anything which may have passed, or by any contract which may have been entered into by the projectors of the company, before their actual incorporation.”

“If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon this contract and that Moss entered into a contract, in his own name, to get the company, when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway: it is, therefore, the agreement of the parties who were seeking an act of incorporation, that, when incorporated, certain things should be done by them. But the question is, not whether there be any bind-

ing contract at law, but whether this court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered; they cannot exercise the powers given by Parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld."

Stanley vs. Chester and Birkenhead Railway Co. 3 Myl., 773, is another of Lord Cottenham's prominent decisions—but both this case and that last quoted from, as well as every other important authority bearing upon this point may be found ably reviewed in the case of,

Earl of Lindsey vs. The Great Northern Railway Company (44 Engch); 10 Hare 643–680, which was decided in 1853. This case is important as containing not only, as above suggested, a full review of the authorities, but also Lord Cottenham replies to his critics, his explanation and defense of his decisions. The last proposition of the syllabus is unusually trenchant and vigorous. It is as follows:—

"The decision in the case of *Edwards vs. The Grand Junction Railway Company* did not proceed on the principle that the incorporated company was

bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle, that the Court would not allow them to exercise powers acquired by means of such contract without carrying it into full effect; and, in the absence of any adoption of the contract of such a party by the incorporated company, or of any attempt to exercise the powers thus acquired, or of any part performance, the Court might refuse to enforce specific performance of such a contract against the incorporated company; but, if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the Court will in that case, not only negatively, but positively, interpose and compel specific performance by them of every portion of the contract."

In the Vice-Chancellor's opinion, on page 658-9, occurs this remarkable passage: "What Lord Cottenham fastens on is this. He says: 'If you acquire powers through the medium of the contract, so entered into by any one who at the time was promoting that measure of which you afterwards reaped the benefit, you shall not exercise any one of those powers without giving full effect to all the arrangements and agreements of that party,'—agent he cannot be called. But the result of that doctrine goes further than the Solicitor-General urged, for he would rather have placed it in this position: He said, you can only negatively restrain certain acts from being done; you cannot positively enforce the performance of any acts to be done. I apprehend the doctrine goes to this extent. It is, in one sense, negative; that is to say, the Court will not interpose by this species of jurisdiction, unless you, the company, are availing yourselves of certain powers which you have thus acquired; but that preliminary condition of interference having once taken effect, you having asserted and exercised those powers, all the other consequences follow positively, and you shall perform every branch and portion of your agreement, and not be

merely negatively restrained from doing acts which, in another sense, are contrary to that agreement."

See also :

Frankfort S. & T. Co. v. Churchill, 6 J. B. Mon. (Ky.), 428.

Grape S. & V. Manuf'g Co. v. Small, 40 Md., 400.

McLaughlin v. Concordia College, 20 Mo. App., 46.

Low v. Railroad Company, 46 N. H., 284.

Barrows v. Smith, 10 N. Y., 566.

It may not be improper to remark, that, while confident of the justice and soundness of what has just been said, it is yet, perhaps, not essential to the establishment of our position : because the case at bar is not, as were most of the cases in the books, essentially and exclusively a case in which a recovery is sought against the Company by virtue of the contract. The plaintiff here claims, rather, that he had a right to be and should have been in and of the Company, and, as such entitled to part ownership and control of the franchise of which the Company, so organized as to exclude him, claims and has exclusive possession. Therefore, our position taken above, and especially, that the Company is not improperly joined as party defendant in this suit, is sound. We could not possibly maintain this suit without calling the Company in.

While not expressly mentioned in the list referred to, pages 114 and 115 of the record, the defendants yet argued orally and in print in the lower courts that the bill was defective and demurrable, for

Misjoinder of Causes of Action.

We submit the bill is clearly not defective upon this ground. The facts set out are parts of the connected history of one transaction or series of transactions, brought to the notice of the Court, as the basis of one right and claim of the plaintiff, and all the relief asked is subservient and incidental

to the effectuation and realization of this one right and claim.

Nothing is more fundamental or familiar than the power and the practice of Courts of Equity to grant other reliefs sought, and especially damages, in addition and as *ancillary or supplemental* to the specific execution of a contract, and scarcely less familiar is the power and practice of these Courts to award damages *in lieu* of specific performance where, for any reason, this particular relief cannot be decreed.

Ground VI of Demurrer.

DEFENDANTS SAY THAT THE BILL IS DEMURRABLE FOR *Non-Joiner* OF THE ASSOCIATES OF THE PLAINTIFF, JOINTLY INTERESTED WITH HIM IN HIS ALLEGED CLAIM AND CAUSE OF SUIT.

There is nothing in this contention. The rule and principle of equity jurisdiction which the defendants seek to apply is not properly applicable. It is true that, *before final decree* an assignee must prove his assignment and, if required, bring in his assignor; and it is also true, that one who sues as assignee only, and assignee of a merely legal claim upon which there is a plain, adequate and complete remedy at law—is not entitled to sue *in Equity*, upon the ground merely that he cannot sue at Law, *in his own name*; but, in the case at bar,

(A) The plaintiff is not the assignee of a merely legal claim, but his assignors themselves clearly had the right, if they had not assigned, to go into a Court of Equity.

(B) Moreover, the plaintiff sues not only ‘as assignee,’ but, as the bill shows, has rights and interests in the premises originally *his own*, and, in such a case, the proper practice is *not* to dismiss the plaintiff’s bill, but if necessary to the proper disposition of the suit, to bring in by amendment those interested with the plaintiff in the subject matter.

Ground VII of Demurrer.

DEFENDANTS SAY THAT QUO WARRANTO IS THE APPROPRIATE REMEDY.

We are at a loss to appreciate this position. If what we sought was the forfeiture of the Traction franchise, then indeed we might appreciate the force of the suggestion, but our right being to a share in a valid and living franchise and the object of our suit being to secure and realize this right, how could the proceeding by *quo warranto* serve our turn?

Ground VIII of Demurrer.

WE UNDERSTAND THIS GROUND OF DEMURRER TO MEAN THAT THE COMPLAINANT DOES NOT COME INTO COURT WITH CLEAN HANDS.

The contention here is, in substance, that it is inconsistent, unconscientious, harsh, and oppressive in the plaintiff to embarrass the development of the Broad street franchise by his suit while claiming to be interested in it. The point has already been touched upon in our brief, in discussing the remedy at law; but it may be well to repeat here that this ground of demurrer, especially, cannot be fairly discussed except upon the basis and concession of the validity of our asserted rights and claims; and if this concession be once made, or this hypothesis be once entertained, how can it possibly be considered unconscientious, harsh, or oppressive in us, to prosecute these rights and claims against parties who not only deny and repudiate them, but have taken every step in their exclusive appropriation of our property after the fullest notice of our claims, and most of these steps after bill actually filed for their enforcement.

Ground IX of Demurrer

WHO ASKS EQUITY MUST DO EQUITY.

And we have done it—every jot and tittle the contract required of us. The bill asserts this, the internal evidences support it, and no one denies it. As to our demanding the issue to us of stock to which we have never subscribed, the bill clearly, fully and emphatically sets out that we did not subscribe because we never had the opportunity of doing so, and that the one definite purpose of the defendants in all they did in connection with the organization of the Company, and the issue of its stock, was, that we should not have such opportunity; but this point too is incidentally disposed of in our brief. We never had an idea of claiming stock without doing everything which equity or law required as a condition precedent to our receiving it.

Ground X of Demurrer.

THE DEFENDANTS BY THIS GROUND OF DEMURRER PRACTICALLY CONTEND THAT THE SECOND AMENDED BILL IS NOT PROPERLY AN AMENDMENT, BUT AN ATTEMPT TO MAKE A NEW CASE.

The point here presented having been, after full argument, settled adversely to this contention of the defendants by the order of the Circuit Court allowing the said bill to be filed, we shall not at this stage re-open the discussion, but insist that the demurrer now being considered by this honorable Court having been filed below to the bill after the last amendment, must be tested by the bill as last amended, and by this test must stand or fall. See:

Neale v. Neales, 9 Wall., 8-9.

The Tremolo Patent, 23 Wall, 527.

Richmond v. Irons, 121 U. S., 43-49.

Jones v. Van Doran, 130 U. S., 690-692.

Hardin v. Boyd, 113 U. S., 761-765.

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Respectfully Submitted,

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for Petitioner L. H. Hyer.





No. 379.

Add: By. of Stiles & Holladay
IN THE *for* Petitioner
Supreme Court of the United States.

Filed October Term, 1897.
Oct. 16, 1897.
No. 379.

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L. H. HYER, Petitioner
v.

RICHMOND TRACTION COMPANY, et al.

On Certiorari to United States Circuit Court of Appeals
for the Fourth Circuit.

CLOSING

Brief for Petitioner Hyer.

ROBERT STILES,
ADDISON L. HOLLADAY,
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for Petitioner Hyer.

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IN THE
Supreme Court of the United States.

October Term, 1897.

No. 379.

L. H. HYER, PETITIONER,

VS.

RICHMOND TRACTION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Closing Brief for Petitioner Hyer.

In the short time left us, between the receipt of the defendants' brief and the day fixed for the hearing of the cause, it is impracticable to prepare and print a full and detailed reply. All that can be done is to again decline to be led off from what we still consider the real questions in the cause, and to expose what we deem to be the false basis and fallacious reasoning of our adversaries' note.

Defendants' Statement of the Case.

The first seventeen pages of their brief are taken up with what the learned counsel term "Statement of Case."

Near the top of page 3, it is declared, that "this is the more important, as the opening brief filed for the petitioner is very defective in its statement of material facts, and misleading in some of its parts. On behalf of those of the defendants represented by us, we therefore submit the following as an accurate statement of the facts disclosed by the record."

Without claiming that our spectacles are colorless, we willingly submit the two statements, side by side with each other and the record, leaving it to the court to decide between them,—premising, however, that the defendants' appears to us to be largely an argument in very thin disguise. Note, *e. g.*, how their entire "statement" is pointed and braced up by the free use of argumentative italics—see pages 4, 5, 6, 10, 11, 13, and 16; the interpolation, pages 3-4, as to the force and effect of the word "Conduit," supported by legal authority, and followed by deduction as to the withdrawal of competition contemplated in the contract of August 9, 1895; the discussion, on page 4, of the construction of the Act of March 20, 1860, and, on page 10, of the combined effect of said Act and the Traction ordinance; on page 12, the elaborate argumentative sentence, embracing three successive clauses under three successive "notwithstanding," and closing with a conclusion in rhetorical contrast with the premises.

We say we do not regard these and other like features as appropriate to the legal statement of a case. But, the great divergence between our statement and that of our adversaries, is not to be found in these, or in any other superficial, formal or unconscious differences. The fact is, the two sides are consciously and of purpose presenting different statements of the case to the court.

In the brief we had the honor to submit, the case is stated as it is set forth *in the last amended bill*, which was filed after the most formal possible notice—as to the particulars in which it would be asked the original bill should be amended; as to the

phraseology which it would be asked should be stricken out; as to the phraseology which it would be asked should be substituted and added: and as to the form which the bill would have if the leave to amend, as asked, should be granted. In short, before any demurrer had been argued, the plaintiff in the court below,—that is, in the Honorable Circuit Court—asked leave to amend the bill, both by striking out and by inserting certain specified phraseology, and so that the bill, as amended, would read ‘*as follows*’:

Battle royal was had over this application, and leave to amend as asked was granted. Thereupon, the plaintiff filed a clean sheet of the bill as amended, and to this amended bill the defendants demurred. This is the demurrer which we argued in the court below, and which we are now arguing here.

Such being undeniably the state of the pleadings, the defendants, in their brief here, pages 19 and 20, make two points substantially as follows:

1. That the court below, *i. e.*, the Honorable Circuit Court for the Eastern District of Virginia, erred in granting the leave to amend.

2. That if such leave was properly granted, yet such is the legal force and effect of amendment—even an amendment of the character above set forth—that, in discussing the demurrer to the amended bill, the argument may properly be based on the bill as it stood prior to amendment.

In other words, the defendants’ theory seems to be this:

Although an amended bill be valid and in no way obnoxious to legal objection, yet, if the original bill prior to amendment was open to objection and invalid, the demurrer to the amended bill, although based upon the very features of the original bill which have been stricken out by amendment, is well taken and should be sustained.

We find it difficult to *seriously* discuss this remarkable position. The entire brief of the defendants, certainly upon the great question of public policy, rests upon this astounding

basis and upon this basis alone. That brief is almost in terms, certainly in substance and effect, *a confession that the defendants have no case on the public policy defense upon the amended bill.* Their statement of the case, as bearing upon this point, is taken substantially, indeed almost exclusively, from the original bill, prior to amendment; while our statement, as above explained, is based exclusively upon the bill as last amended. This is the essential difference between the defendants' view and statement of the case and ours.

Their position strikes us as so extreme that we might be disposed to question whether we correctly apprehend the learned counsel, if they had not, upon page 18 of their brief, in the formal synopsis of their argument, laid down, as the introductory and fundamental proposition:

"The right to use the statements of the original bill omitted in the last amended bill," notwithstanding the fact above recited that the complainant's bill was amended, by leave of court granted after notice to defendants, after arguments *pro* and *con*, and prior to a hearing upon any demurrer filed by the defendants; and notwithstanding the fact that the cause was heard by the Circuit Court "upon the defendants' demurrer to the complainant's second amended and supplemental bill (that is to say, the amended and supplemental bill as amended by the decree herein of April 6, 1896, and in the form filed on the 18th day of April, 1896)"—see pages 119, 120, printed record—from which last mentioned bill the "omitted" statements had been stricken out by leave of the Circuit Court.

We respectfully submit that this contention is wholly without merit. Not only is it not sustained by the authorities cited in support of it, as we understand those authorities, but it is, upon several grounds, contrary to the entire theory and practice of "Amendment" in the courts of the United States, indeed in any courts, as numberless authorities show.

In *Chapman v. Barney*, 129 U. S., 681, this court said that "Amendments are discretionary with the court below, and not reviewable by this court." An order allowing the amend-

ments made by the complainant might have been entered by the Circuit Court without notice to the defendants, as provided by Equity Rule 29; but the Circuit Court exercised its discretion in this matter cautiously after notice to the defendants, and after considering the petition setting out the proposed amendments and the reasons why they should be allowed in the light of full argument upon formal printed briefs for and against the proposed amendments. The discretion vested in the Circuit Court was not only cautiously but rightly exercised. The amendments were in all respects proper in the light of surrounding circumstances, of which the Appellate Court cannot become as fully possessed as the trial court.

The rules and principles applicable in such cases have been stated by this court in numerous cases.

5 Cranch, 15.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Mundeville v. Wilson*, 5 Cranch, 15, “Marshall, Chief Justice, observed that the permitting amendments is a matter of discretion. He did not mean to say that a court may in all cases permit or refuse amendments without control. A case may occur where it would be error in a court, after having allowed one party to amend, to refuse to suffer the other party to amend also before trial. But that is not this case. After the parties have gone to trial upon a set of pleadings, and the judgment has been pronounced, it may be doubted whether the court can permit the demurrer to be withdrawn. It would not be right in all cases, after the party had taken issue upon the law and it has been decided against him, to suffer him also to take issue upon the fact. If it be permitted, it is a matter of great indulgence.”

6 Cranch, 206.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Marine Insurance Co. v. Hodge*, 6 Cranch, 214, the trial court having sustained demurrers to five pleas tendered by the

defendants and refused to allow the demurrer to the sixth plea, the cause was taken by writ of error to this court, where the demurrer to the sixth plea was sustained, and the cause remanded to the Circuit Court for further proceedings, 5 Cranch, 100. When the cause came to a second trial the defendants moved the lower court for leave to file two additional pleas, which motion was denied, and this action of the Circuit Court was one of the errors assigned on the second appeal.

Mr. Justice Livingston, speaking for the unanimous court, said :

“ This court does not think that the refusal of an inferior court to receive an additional plea or to amend one already filed, can ever be assigned as error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case than by any precise and known rule of law, and of which the superior court can never become fully possessed, that there would be more danger of injury in revising matters of this kind, than what might result now and then from an arbitrary or improper exercise of this discretion. It may be very hard not to grant a new trial, or not to continue a cause, but in neither case can a party be relieved by a writ of error: nor is the court apprised, that a refusal to amend or to add a plea was ever made the subject of complaint in this way. The court, therefore, does not feel itself obliged to give any opinion on the conduct of the inferior court, in refusing to receive these pleas. At the same time, it has no difficulty in saying that, even in that shape of the proceedings, the Circuit Court might, if it had thought proper, have received these additional pleas, or admitted of any amendment in those already filed.”

6 Cranch, 253.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Sheehy v. Mauderville*, 6 Cranch, 253, the following appears at the foot of the opinion :

"After the opinion was given, C. Lee moved for a direction to the court below to allow a plea of *non assumpsit*. The court said they had never given directions respecting amendments, but had left that question to the court below. This court cannot now undertake to say whether the court below would be justified in granting leave to amend."

9 Wheat., 576.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Walden v. Craig*, 9 Wheat., 576, Chief Justice Marshall said:

* * * * "The cases cited by the plaintiff's counsel in argument are, we think, full authority for the amendment which was asked in the Circuit Court, and we think the motion ought to have prevailed. But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a Circuit Court granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. For this reason, the writ of error must be dismissed."

1 Peters, 165.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Wright v. Hollingsworth*, 1 Peters, 165, the court, at page 168, said:

"They allege the judgment is erroneous and should be reversed.

"1st. Because the count on which judgment was rendered against them does not show that Missouri is one of the United States.

"2d. Because the court permitted the declaration to be amended by adding a new count on the demise of Benjamin Spencer; and especially as the amendment was permitted with payment of costs.

"3d. Because no plea was filed to the new count, nor any issue made up thereon.

* * * * "In support of the second objection, it is urged that the admission of the new count, on the demise of a new lessor, made a material alteration in the suit; that the suit having been originally commenced under the State practice, by writ of *capias ad respondendum*, to which the former lessors only were parties, the amendment was, in substance and effect, the institution of a new suit, or at least grafting a new one upon the old; and produced an incongruity upon the record; the first and second counts, and the proceedings on them, being proceedings under the statute, and the third, or new count, a proceeding at common law; and that, according to established principles of practice, it should have been allowed, if at all, only on payment of costs.

"This argument would be entitled to great, and perhaps decisive influence, if addressed to a court, having any discretion or power over the subject of amendments.

"But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials; and, indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This, it is true, may, occasionally, lead to particular hardships; but, on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly it was held by the court in *Wood v. Young* (4 Cranch, 237), that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned. That the refusal of the court below to grant a new trial, is not matter for which a writ of error lies (5 Cranch, 11, 187, and 4 Wheat, 220); and that the refusal of the court below to allow a plea to be

amended, or a new plea filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. We can perceive no distinction in principle between these cases and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the court below did not, as it ought, require the costs formerly accrued to be paid as a condition of the amendment."

3 Peters, 12.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *United States v. Buford*, 2 Peters, 12, the Court at page 32, said :

"The court, it is contended, in refusing leave to amend, decided the effect of this covenant, and that they erred in their construction of it.

"This court has repeatedly decided that the exercise of the discretion of the court below, in refusing or granting amendments of pleadings or motions for new trials, affords no ground for a writ of error. In overruling the motion for leave to withdraw the replication, and file a new one, the court exercised its discretion, and the reason assigned as influencing that discretion, cannot affect the decision."

2 Howard, 263.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Matheson v. Grant*, 2 How., 263, Mr. Justice Story, at page 284, said : "There is yet another view of this matter. The question of the amendment was a question of discretion in the court below, upon its own review of the facts in evidence; and we know of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seem to us to have belonged appropriately and exclusively to that court."

7 Peters, 634.

Subject: Amendment of Pleading—Discretion of Trial Court.

In *Ex-parte Bradstreet*, 7 Peters, 634, 647, Chief Justice Marshall said: "After hearing counsel and considering the cause shown by the honorable the judge for the court of the United States for the Northern District of New York, this court is of opinion that it ought not to exercise any control over the proceedings of the District Court in allowing or refusing to allow amendments in the pleadings; * * * "

2 Mason, 342.

Subject: Amendment of Pleading—Discretion of Trial Court.

In the case of *Hunt v. Rousmaniere*, 2 Mason, 342, 365, a well considered opinion was delivered by Story, J., after elaborate argument by Hunter and Randolph on one side, and Searle and Hazard on the other, in which that eminent jurist said: "This cause has been again argued upon the amended bill, and now stands for judgment. Some doubt has been thrown out in argument, as to the authority of the court to allow an amendment of the bill, after the cause had been decided in favor of the demurrer. I should be sorry, that any doubt of the propriety of such a practice should prevail in any case, where the court should be of opinion that it was called for by the real merits and justice of the case. If there were a stubborn rule of practice against it, it might induce one to pause. But I know of no such rule; and as far as cases go, they only show, that the court will exercise its discretion cautiously on applications of this nature. The authority of the court upon general principles seems unquestionable; and if it needed support, it falls within the express language of the judicial act of 1789, ch. 20, §32, which declares, that the courts of the *United States* 'may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the courts respectively shall in their discretion and by their rules prescribe.' "

129 U. S., 681.

Subject: Amendment of Pleading—Discretion of Trial Court.

And in the recent case of *Chapman v. Barney*, 129 U. S., 677, 681, decided March 5, 1889, it was again declared in plain and emphatic language that amendments are discretionary with the trial courts, and are not reviewable by this honorable court. In this case Mr. Justice Lamar, in delivering the unanimous opinion of the court, page 681, said:

"We do not think the first assignment of error well taken. Amendments are discretionary with the court below, and not reviewable by this court. *Mandeville v. Wilson*, 5 Cranch, 15; *Sheehy v. Mandeville*, 6 Cranch, 253; *Walden v. Craig*, 9 Wheat, 576; *Chirac v. Reinicker*, 11 Wheat, 280; *Wright v. Hollingsworth*, 1 Pet., 165; *United States v. Buford*, 3 Pet., 12; *Matheson v. Grant*, 2 How., 263; *Ex-Parte Bradstreet*, 7 Pet., 634."

The complainants' petition asking leave to amend may be found on pages 66 to 79 of the printed record, and the decrees allowing amendment at pages 66, 118-119.

The discretion of the Circuit Court in allowing the plaintiff to amend his bill was exercised after giving due weight to the ingenious argument of defendants' counsel resisting the application, and its action is fully sustained by the rules of equity practice and the principles declared by this court in many cases.

These rules and principles were discussed in the printed argument filed by us, as counsel for the complainant, before the Circuit Court upon the application to amend, and the following are extracts from that brief, the italics employed being our own:

QUOTATION.

In the case of *The Tremolo Patent*, 23 Wall., the Court, at page 527, said:

"We think that the order of the Court directing that the

record be amended by inserting in the bill an averment of the second re-issue was properly made, under the circumstances of the case, though made after the final decree. For practically the rights of the complainants under the second re-issue, and the defendants' infringement thereof were in issue under the answer and the replication. The amendments deprived the defendants of no rights which they had not enjoyed during all the progress of the trial. It may well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried. It is true that an amendment which changes the character of the bill ought not generally to be allowed *after* a case has been *set for hearing*, and still less *after it has been heard*. *The reason is that the answer may become inapplicable if such an amendment be permitted.* But in this case the defendants were not prejudiced. They had every advantage they could have had, if the bill had originally averred the second re-issue. The case is undoubtedly anomalous, but we think justice would not be subserved by denying to the Circuit Court the power to order such an amendment as was made, after the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment."

In *Richmond v. Irons*, 121 U. S., 27, the Court at page 46, said:

"The action of the Circuit Court in permitting these amendments we think is justified by the rules on that subject as stated by this Court in the case of *Neale v. Neales*, 9 Wall., 1; in *Tremolo Patent*, 23 Wall., 518; and *Hardin v. Boyd*, 113 U. S., 756, 761. In the last mentioned case it was said (p. 761): 'In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the Court; and that discretion must depend largely on the special circumstances of each case. *It may be said, generally, that, in passing upon application to amend, the ends of justice should never be sacrificed to mere form, or by too*

rigid an adherence to technical rules of practice. Undoubtedly great caution should be exercised when the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, *and to which the parties have directed their proofs.*"

In *Jones v. Van Doran*, 130 U. S., 684, Mr. Justice Gray, speaking for the Court, at page 690, said :

"The only difference between the original and amended bills is that the first alleges that the defendant Jones took the conveyance of the plaintiff's right of dower upon an express trust for her, whereas the second alleges that he procured the conveyance from her by fraudulent misrepresentations as to the nature of the instrument, creating a trust by operation of law in her favor. The other facts alleged in the two bills are substantially identical. Each bill proceeds upon the ground that the defendant Jones was a trustee for the plaintiff, and that the defendant Van Doran, taking the land from him with notice of all the facts, was affected by the trust; *and the object of both bills is the same, to obtain the right of dower of which the plaintiff has been deprived by the acts of the defendants, and to which she was entitled under laws of Minnesota in force at the time of her husband's death.*"

Pub. Stat., 1849-1858, c. 36 S., 1.

"The amendment was therefore one which the Court in the exercise of its discretion might properly allow, and the motion to strike the amended bill from the files was rightly denied."

Hardin v. Boyd, 113 U. S., 756.

In the case of *Belton v. Apperson*, 26 Gratt., p. 207, Judge Staples, in delivering the opinion of the Court, on page 215, said :

* * * "The rule in equity in regard to amendments is, that

they may be made when the bill is defective in its prayer for relief, or in the omission or mistake of some circumstance connected with the substance of the case, but not forming the substance itself. The plaintiff will not be permitted to abandon the entire case made by his bill, and make a new and different case by way of amendment. *Shields v. Barrow*, 17 How., U. S. R., 130, 144."

"According to the English practice, where a party has mistaken his case, and brings the cause to a hearing under such mistake, the rule is, to dismiss the bill without prejudice to a new bill. But even there the rule is in many cases disregarded. Thus in *Mayor v. Dry*, 2 Sim. & Stu. R., 113, the complainant by his bill, sought to set aside a deed upon the ground of fraud. The defendant answered insisting upon the deed: the complainant being satisfied the deed could not be successfully impeached, was permitted to file an amended bill relying upon it."

"In *Smith v. Smith*, Cooper's Ch. Cas., 141, a bill for an account against the defendant as bailiff was allowed to be changed into a bill for the foreclosure of a mortgage. See the cases cited in 1 Daniel's Ch. Prac., page 408. It is said by the author just mentioned, that great latitude is allowed to the plaintiff in making amendments, and the court has gone to the extent of permitting a bill to be converted into an information. It has been held where a plaintiff filed a bill stating an agreement, and the defendant by his answer, admitted there was an agreement, but different from that stated by the plaintiff, that the plaintiff might amend his bill abandoning his first agreement and praying for a decree according to that admitted by the defendant.

"In the different States it is well known, that the practice of courts of equity in allowing amendments is much more liberal than in England. Those courts while professing to adhere to the rule, that the plaintiff shall not by his amended bill make a new case, have allowed so many departures from it that it is now scarcely susceptible of any very accurate definition.

"For example: In *Philhower v. Todd*, 3 Stock. R., 54-312, it was held, even after a hearing upon a motion to dissolve an injunction and the delivery of the court's opinion, that the injunction should be dissolved and the bill dismissed, the injunction might be retained and the party permitted to amend by altering the frame and the averments of his bill.

"In *Buckley v. Corse*, Saxton's R., 504, the bill charged that the plaintiff had title to the premises *older than the defendant's mortgage*, but that under the belief that the mortgage was prior to his estate, the plaintiff had agreed to pay it, and had advanced large sums on that account. The bill prayed for an account of the moneys thus paid. Upon the coming in of the answer denying the allegations of the bill, the injunction was dissolved. Afterwards the complainant had leave to amend by making it a bill *to redeem the defendant's mortgage*. See *Henry v. Brown*, 4 Halst. Ch. R., 245; *Harris v. Knickerbocker*, 5 Wend. R., 638; S. C. 1, Paige's R., 209; *Bellows v. Stone*, 14 New Hamp. R., 175; *McDougal's adm'r v. Williford*, 14 Geo. R., 668; *Neale v. Neales*, 9 Wall., U. S. R., 1.

"It is, however, unnecessary to multiply these citations from foreign courts, when we have cases so much nearer home.

"In *Anthony v. Leftwich's Rep.*, 3 Rand., 238, the bill was filed for specific execution of a contract relating to land. This court was of opinion, upon the pleadings and evidence, it was not a case for specific performance. It, however, remanded the cause to the Circuit Court, with leave to the complainant to make new parties, and claim compensation for the improvements he had made on the land.

"In *Parrilly v. McKinley*, 9. Gratt., 1, the bill was for specific performance, and the plaintiff was permitted to file an amended bill asking for a rescission of the contract. If these cases do not show that the plaintiff was permitted to make a new case, they at least show that he may by his amendment, so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally. This is

founded upon good reason. Why should the plaintiff be put to a new bill for different relief upon the same transaction when the object can be accomplished by an amendment." * *

In *Daniel's Chancery Practice*, First American Edition, page 454, it is said that the practice in regard to amending bills, is as follows :

" When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties as are necessary to enable the Court to do complete justice, he may alter it, by inserting new matter subsisting at the time of exhibiting of his bill, of which he was not then apprised, or which he did not think necessary to be stated, and may add such persons as shall be deemed necessary parties ; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to plaintiff's case, or parties which may be dispensed with, the same may be struck out ; and the original bill, thus added to or altered, is termed *an amended bill*."

END OF QUOTATION.

We also relied upon the able opinion of Mr. Justice Gray, in the recent case of *In Re Sanford Fork and Tool Co.*, 160 U. S., 255, and on the cases listed upon pp. 125-126 of our opening brief.

We quote further from our brief filed before the Circuit Court on the plaintiff's application to amend.

QUOTATION.

Counsel for defendants contend in their note that the plaintiff ought not to be allowed to amend because, in their opinion, his original bill contains admissions which they should be allowed to use against him. Here we have an illustration of the willingness, indeed the purpose, of the defendants to twist the language of the bill to the detriment of the plaintiff and to their advantage, and also a demonstration that the complainant should be given an opportunity to correct or to guard

against any possible misconstruction of his language, before the argument of the demurrers or the filing of an answer by the defendants. The complainant has therefore asked in his petition for leave so to amend, that sub-division VII of his original bill may have inserted therein a paragraph in the following words:

"And your orator here takes occasion to state that he applied for and obtained leave of court to amend his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees: not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895."

In *Finley v. Lyon*, 6 Cranch, 238, the 2d paragraph of the syllabus is as follows:

"The complainant in equity may have relief even against the admissions in his bill."

This yet further illustrates the liberality of Federal Practice; but in the case at bar the plaintiff has made no such admission as the defendants, by torturing and twisting his language, have attempted to attribute to him. Even if ground existed for plausibly torturing and twisting the phraseology of the bill, how would the defendants be injured by allowing the plaintiff to amend and to state with clearness and precision the case he expects to prove by his testimony? If that case, so stated, be not liable to demurrer, the defendants can set up their defense thereto by plea or answer, and when proofs are taken, what will hinder them from introducing, as a part of their testimony, any supposed admission contained in the original pleadings remaining on file in this cause? To ask these questions is to answer them.

On the other hand, if the plaintiff should not be allowed

to amend his bill, and it should by possibility be dismissed on demurrer because of his failure to amend as prayed in his petition, he will thus have been cut off from proving his actual case, by the ingenuity of the defendants in distorting his language into a meaning which he never intended to convey. That is to say, the defendants, by their construction of his language, will have made for the plaintiff a case different from his actual case, and different from the case he intended to state. Can it be, that a court of equity will even run the risk of doing such injustice; and that, too, under a practice as liberal as the equity practice of the courts of the United States, at a stage of the proceedings before demurrer sustained or answer filed, and while the plaintiff is respectfully claiming his right to amend under the broad charter and protection of Rule 29?

In the view we take of this matter, if the defendants have *any right* to resist the application of the plaintiff under Rule 29 to amend his pleadings as prayed in his petition—the grounds upon which they can pretend to do so with even the slightest show of reason are two only—to-wit:

First. That the plaintiff has already prostituted or proposes now to prostitute his right or his grace of amendment for the purpose of delay; and

Second. That his bills, as proposed to be amended, will make a case legally distinct from the case made in his bills already filed.

In opposing the *first* suggestion we feel it necessary only to disclaim in behalf of our client as well as ourselves the purpose or motive attributed to us in making this application, and to request your Honor and opposing counsel to note that the filing of the first amended bill was rendered necessary by the action of the defendants *pendente lite*, and that the very first appointment for the argument of the demurrers in the cause has not yet passed.

In reply to the *second* suggestion, we need only call atten-

tion to the authorities herein above cited upon the point involved, in all of which the proposed amendments were allowed and in every one of which the bill as amended was far more widely differentiated from the original bill than our bills, as proposed to be amended, are, or can be differentiated respectively from the original and amended bills now on file in the cause. In this connection, it is too plain either to require statement or to admit of denial, that the *object* of the suit, as brought and as thus far and now proposed to be amended, is the same, to-wit: the enforcement of the contract rights of our client to a one-half interest in the Traction franchise and enterprise; that the *basis of fact* upon which this is claimed is, throughout all the bills, the same; and that the *relief* sought in the original and amended bills, respectively, as now proposed to be amended, is identically the same with the relief sought in the bills now on file in the cause.

It may be well to note that the italics used in the passages quoted from the reports, are those of counsel, and will not be found in the opinions as reported in the books. Also that, while one of these opinions quoted from the Supreme Court of the United States, drew a definite discrimination between amendments *under Rule 29*, and amendments *at later stages* of a cause—holding that the *former are of course and of right*—and the *latter under the discretion of the Court*—the other opinions (or other opinion), which referred to *all* amendments, as being subject to such “discretion,” were rendered in cases where the applications to amend were actually made, late in the history of the causes, and after Equity Rule 29, ceased to have any application.

But, if your Honor shall be of opinion that the application of the plaintiff to be allowed to amend, even at this early stage of the cause, is one to be granted or denied in your discretion, then we humbly, but confidently press upon the consideration and the grace of the Court, the strong reasons herein above suggested, why the prayer of our petition should not be denied.

END OF QUOTATION.

We respectfully submit, that the language stricken from the original bill is as completely out of the record, upon consideration of the demurrer to the second amended and supplemental bill, as if the omitted words had never appeared in the original bill. It would be idle to allow amendment of pleading, and then hold that the amended pleading may be considered as it stood prior to amendment. No such rule prevails in the courts of the United States. No such rule is sanctioned in chancery practice. The greatest liberality should prevail in allowing the plaintiff to state his case; to state with clearness and precision the case to which he intends to direct his testimony, the case he expects to prove; and, if he has used language which by possibility might be construed to carry a meaning he did not intend to convey, to make the proper correction and employ language free from all ambiguity. If the rule were otherwise, the ingenuity of defendant's counsel, in giving to the words used a meaning never intended by the pleader, would enable the defendants to make for the plaintiff a case different from his actual case, different from the case he intended to state, and to which his proofs will be directed. If the allowance of amendments is discretionary with the trial court, as this court has so often declared, then such a miscarriage of justice can always be averted.

Each case depends upon its own circumstances and surroundings as disclosed to the trial court, and of which the appellate court can never become so fully possessed as the trial court.

The language of Mr. Justice Livingston in *Marine Ins. Co. v. Hodgson*, 6 Cranch, 214, already above quoted, is strikingly apposite. That learned jurist said: "The court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned as error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law, and of which the Superior Court can never be fully

possessed; that there would be more danger in revising matters of this kind than what would result now and then from an arbitrary or improper exercise of this discretion." * *

20 Cal., 182.

Subject: Withdrawal of Competition—Amendment of Pleadings.

Amongst the authorities cited by the defendants—page 29 of their brief—under the head “Withdrawal of Competition,” is the case of *Sloan v. Chorpennig*, 20 Cal., 182, which was an action upon a contract providing for the withdrawal of a bid for a mail route (to be awarded to the lowest bidder), in consideration of an interest in a longer route—which the plaintiff was to induce the Government to give to the other contracting party—or equivalent money compensation. The contract was held void, as against public policy.

The case is doubly instructive. In the first place, it responds perfectly to the test herein below suggested as applicable to cases of this character. The opinion of the court expressly states that “The agreement was entered into for the accomplishment of a project of which *the Government was ignorant*, and whether or not withdrawal would be detrimental, was a matter of conjecture only. The Government *was not consulted*, and, so far as appears, the Department intrusted with the management of these affairs *neither knew of the agreement nor assented to the withdrawal*” (italics ours).

But the case is yet more interesting, in its bearing upon the power and practice of the courts *in allowing amendments*, upon *the effect of amendments* when allowed, and upon what we have characterized as “*the remarkable position of the defendants*,” to-wit: that the amendment in this case was improperly granted, and that, even if properly granted, the questionable or objectionable features stricken out of the original bill may still be made the basis of demurrer to the amended bill.

Upon petition for rehearing, Cope, J., said, **Field, C. J., concurring**:

“The petition for a rehearing in the case must be denied;

but, as the counsel for the appellant thinks that the complaint can be amended so as to avoid the objection upon which we directed a dismissal of the suit, we shall modify our judgment in that respect. The judgment will be so modified as merely to affirm the order appealed from, and the court below, before proceeding to retry the case, may allow such amendments to the complaint as shall appear to be proper, in view of the opinion expressed by us upon the validity of the contract as set forth in the complaint as it now stands.

“Petition denied, and judgment modified as above stated.”

All this, be it noted, *after*—ruling of the court upon the question, verdict of the jury upon the case, new trial granted, appeal, affirmation, and direction to the lower court to dismiss the suit.

We submit then, upon the *preparatory* or *introductory* branch of the case, determining *the basis upon which* the points involved in the demurrer, are to be considered and discussed, that,

1st. This Honorable Court will not review the discretion exercised by the Honorable Circuit Court, in granting the plaintiff leave to file the last amended bill.

2nd. Even if the exercise of that discretion were reviewable by this Court, yet the exercise of that discretion and the granting of that leave were proper, in view of the character of the amendments proposed and the stage of the cause at which the leave to amend was asked.

3rd. Either or both of these positions being sound, the demurrer must be considered and discussed with exclusive reference to the last amended bill, and by this test it must stand or fall.

Approaching now the argument proper, we remark at the outset, that, while the formal abstract of their argument, on page 18, embraces nominally some *five* points, exclusive of the

introductory point above discussed, yet even a casual examination of their brief, will show beyond peradventure that,

The Defendants Concur with the Plaintiff as to the Real Questions, or rather the Real Question, before the Court.

The *seventeen* pages of their "statement of the case," are consumed in the effort to find a basis for the public policy defence, and the following *eight* pages, involving the introductory discussion as to the right to use the statements stricken from the original bill, have no other purpose.

This brings us to page 26 of their brief, which thereafter, down to the middle of page 61, is taken up with the direct discussion of the law of **Public Policy**, as bearing upon and invalidating the contract of August 9th, 1895. Thus *sixty-one* pages of the defendants' brief are devoted to this point, and only *twenty-one* to the other four points nominally discussed.

It is further noticeable, that only *three and one-half* ($3\frac{1}{2}$), pages are given to the discussion of **Remedy at Law**.

We now come to the discussion of the *five* grounds of demurrer which have so far survived the conflicts of this litigation that our opponents are willing to bring them before this honorable court. Following the order of their brief (see page 18), let us take up first the great question of

PUBLIC POLICY,

upon which, as all the briefs filed herein indicate, both sides consider the fate of the demurrer really depends.

In our view, the most vital proposition of our argument, the weight of which, in favor of the plaintiff, *especially upon demurrer*, can scarcely be exaggerated, is the

PRESUMPTION IN FAVOR OF THE VALIDITY OF CONTRACTS.

We confess to no little surprise that, on page 16 of their brief, counsel for the defendants not only admit the soundness

of this canon, but assert its fundamental and axiomatic character with a vigor bordering even upon discourtesy, declaring that "This canon of construction is familiar to every tyro in the profession." And, not content with this emphatic approval and concurrence, they lay down another "rule of law," which they are very much mistaken in presuming that we are disposed to contest, to-wit: that "if it clearly appears that the contract sought to be enforced is illegal * * * the presumption of legality is overcome, and the contract cannot be enforced by the courts;" which is very much as if it should be said: If it clearly appears that a man is guilty, the presumption of innocence is overcome, and he cannot be acquitted of the charge.

THE TEST OF ILLEGALITY.

We beg to assure the learned counsel, however, that we are entirely satisfied with their amendment of our canon. We not only accept it, but we return thanks for it, and respectfully press it upon the attention of the court. "**If it clearly appears * * * that a contract is illegal!**" Yes, this is the test in cases involving the validity or invalidity of contracts with reference to public policy; this is the test, applicable indeed in all stages of the cause, but specially appropriate *upon demurrer*. The illegality, the violation of public policy, must "clearly appear," else the contract will be pronounced valid. The court will bear with us if we once more suggest a disposition of this case—in brief and complete in itself—by bringing together the test and touchstone thus submitted, with the concurrent endorsement of counsel on both sides, to-wit:

THE ILLEGALITY, THE VIOLATION OF PUBLIC POLICY, MUST CLEARLY APPEAR.

And, side by side with this, the proposition or question more than once propounded in our opening brief—

"Is it necessarily contrary to Public Policy for two rival applicants for a Legislative charter to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?"

We confess to a strong inclination to leave the **public policy** defence, with this short statement superadded to the elaborate discussion in our first note, which we do not consider to have been seriously affected by the ingenious brief of the defendants; largely because, as we conceive, the defendants have made a great mistake in basing their argument almost exclusively upon the statements stricken from the original bill, though, it is fair to add, under the stress and pressure of the evident hopelessness of their case upon the amended bill.

It will, perhaps, be more respectful, however—possibly also more prudent—to reply a little more *in extenso* to the handsome argument of our friends. Therefore, let us consider briefly the *first* of the two grounds upon which the defendants claim that the contract of August 9, 1895, is violative of public policy, to-wit:

WITHDRAWAL OF COMPETITION.

It would be worse than useless to wade through all the cases cited by our learned opponents under this head, and to attempt to deduce from them a harmonious view as to the true test between such contracts for the 'withdrawal of competition,' as are necessarily invalid, and such as are, or may be, valid. The tests proposed are almost as numerous as the decisions. In some cases, the effect of the withdrawal is emphasized; in others, the "necessary" or "inevitable" tendency of the contract; in others still, the object or intention of the parties. But it is not well to waste time upon the reduction of out-works. Let us advance at once upon the citadel of our foes. Upon page 40 of their brief, after giving numerous extracts from the cases, and attempting to exclude the case at bar from the protection of a certain class of authorities cited by us, the learned counsel for the defendants print the following in italics and capitals, as their analysis of the contract in this case, and demonstration of its illegality, to-wit:

"Men may lawfully combine to purchase what individually they

can not or would not buy, or to acquire and exercise a public franchise under similar circumstances. Such combinations everywhere appear in the conduct of public improvements. But, where two or more persons, or sets of persons, ONCE COMPETE for a public franchise, and AFTERWARDS WITHDRAW competition in order to obtain the franchise on better terms for themselves, IT IS ILLEGAL."

The proposition proves too much. Its vice is that it takes no note and makes no exception of a class of cases characterized by a feature which undoubtedly, as we view the matter, removes them from the operation of the rule laid down by the learned counsel—a feature, we may add, peculiarly prominent in the case at bar—implied, to say the least, in the original bill, but expressly asserted and emphasized in the amended bill.

We refer, of course, to the feature and the fact that—

The entire understanding between the parties to the contract of August 9, 1895, the basis of their contract, co-operation and joint application, was fully disclosed to the Legislative body which had in its power the granting or withholding of the franchise.

Whatever may fairly be said, to the effect that secrecy or concealment is not a necessary element in the illegality or invalidity of a contract for "Lobby Services," it is hardly too much to say that it is in the nature of things inconceivable that there should be a vicious, illegal and invalidating "Withdrawal of Competition," for a public franchise, where a clean breast is made of the entire matter to the dispensing Legislature. Is it true—is the Court prepared to declare (for to this extent and this extreme goes the proposition of the defendants)—that competition for a Legislative charter cannot be legally and validly terminated *by a grant of the charter to the rival applicants jointly*, even though they make a full and candid statement of their agreement and co-operation to the Legislative body, which of course, has had before it both competing propositions, or proposed charters, and is under no obligation

to grant the charter to either side, or even to both conjointly? We do not believe this great tribunal is prepared to announce any such doctrine as this, and if not, there is an end of the matter.

It does not then, "clearly appear," that the contract of August 9th, 1895, is necessarily illegal. If indeed it be susceptible of two constructions, *one* of them is certainly the natural, simple, clean and healthful understanding and agreement we have just above suggested, and therefore the contract of August 9th, 1895, **upon demurrer at least**, will be declared *not* obnoxious to the law of Public Policy, as contemplating a secret, harmful, and unlawful withdrawal of competition.

The opinion of the honorable District Judge, sitting upon appeal in the Circuit Court of Appeals, upon this branch of the case (see printed record, pages 142-145), is so apposite, so balanced, so compact with wise suggestions, and with points we desire to make, but feel unable to make so briefly or so well, that, at the risk and cost of repetition, we beg leave here again to quote it, and with it to close what we have to say upon the "**Withdrawal of Competition.**"

EXTRACT FROM JUDGE BRAWLEY'S OPINION.

"It is not contended, nor can it be assumed, that Hyer or Sheild, either or both, had such control or monopoly of the building of street railways that they could by combination put up the price or demand an unusual or unreasonable franchise or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or non-action. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest, ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right.

"The franchise in question was not a thing that was put up at public auction and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The City Council of

Richmond, faithful, as it must be assumed, to its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an object which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and to hold a contract void because its tendency may be to defeat competition, it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfillment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. *When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint co-operation, and they voluntarily combine in furtherance of the enterprise, and there can be no objection to it if it is done honestly and in good faith.* Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish the desired end, it should be sustained. 'If there is one thing,' says Sir George Jessel in a recent case, 'which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.'

"All presumptions are in favor of the legality of contracts—all reasonable intendments are indulged to support them—if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion

can be drawn from them, for intention to violate the law is not to be presumed. * * * * *

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter, on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract, of his own seeking, on the ground that it was immoral, and, therefore, that he has the right to make off with the swag." (*Italics ours.*)

Upon page 27 of their brief, counsel for the defendants say :

"It is contended for the demurrants that the contract sued on is plainly Against Public Policy. And this on two grounds, its stipulation to withdraw competition already existing for the grant of a franchise in which the public is interested, and the unlawful manner in which the parties were to obtain and enjoy said franchise."

We have discussed the *first* of these grounds; the *second* is condensed by the defense on page 43 of their brief, in the single word,

LOBBYING.

No Contingent Compensation in the Case at Bar.

We fail to recognize even a decent amount of plausibility in the assumption of the learned counsel that this case belongs to the class in which contracts with agents to secure the passage or defeat of legislation, in consideration of "compensation," "contingent compensation," "high contingent compensation," has been held void, as violative of sound public policy.

The principle of these cases is clear and is embodied in

statute in many of the States of the Union. It is that these agents, having no original interest in the subject matter of the bills advocated by them, but being interested only for pay, appear habitually in a false character and gravitate naturally toward false and improper methods. A bad odor has gathered about this class of men who make a business of legislation, the purity of which, and of public business generally, has suffered greatly at their hands: so that both courts and legislatures are properly on their guard against them.

Yes, the origin, the principle, and the gradual extension and development of this class of cases are clear enough and sound enough; but we say again, as we have said before, that *it is a misuse of language to classify the case at bar with cases of this character*. Neither Hyer nor Sheild was, in any proper sense, an agent working for pay. On the contrary, so far as the record shows, Hyer and Sheild and their associates simply agreed to co-operate in the prosecution and development of their own joint project and enterprise, with the chance of failure or success which all men in all the enterprises of life must encounter. We submit, therefore, that the great array of cases cited and quoted in the brief of the defendants, on pages v and vi and 43 to 45 *et seq.*, *reprobating and invalidating contracts involving compensation to agents for lobby services*, is altogether inapplicable and irrelevant.

This suggestion disposes of the following cases:

Tool Co. v. Norris, 2 Wal., 45.

Trist v. Child, 21 Wal., 441.

Mcquire v. Corwine, 101 U. S., 108.

Oscorgan v. Arms Co., 103 U. S., 261, 269, &c.

Clippenger v. Hepbrough, 5 Watts & S. (Pa.), 315.

Mills v. Mills, 40 N. Y., 543, 546.

Rose v. Truax, 21 Barb. (N. Y.), 3.

Harris v. Roof, 10 Barb. (N. Y.), 489.

Powers v. Skinner, 34 Vt., 274, 281.

Bryan v. Reynolds, 5 Wis., 200.

Elkhart Co. Lodge v. Crary, 98 Ind., 238.

Sweeney v. McLeod, 15 Oreg., 330.

Ormerod v. Dearman, 100 Pa. St., 561.

Spalding v. Ewing (1896), 149 Pa. St., 379.

Houlton v. Dunn, 60 Minn., 26.

Wood v. McCann, 6 Dana (Ky.), 366.

Yates & Ayres v. Robertson & Berkeley, 80 Va., 475.

Fuller v. Dame, 18 Pick., 472.

Edgerton v. Brownlow, 4 H. of L. Cases, 1-255.

Many of these decisions are inapplicable upon other grounds also, while not a few are authorities actually favorable to the plaintiff. The remaining citations of the defendants under this head, not disposed of by the above suggestion, are nearly all of them, by their character and circumstances, differentiated widely and clearly from the case at bar. But there are two or three which perhaps require further notice.

The case of *Chippewa Valley, &c., R. R. Co. v. Chicago, &c., R. Co.*, 75 Wis., 224; 8 C., 6 L. R. A., 601, is cited at least three times in the brief of the defendants, on pages 39, 46 and 49, and, was below and is here, emphasized as one of the most apposite and conclusive authorities against the plaintiff to be found in the books. At pages 46-47 of their brief in this court, the defendants say of this case:

"The circumstances were remarkably like those in the case at bar. A contract was made by two railroad companies, whereby one agreed to refrain from any effort to obtain a grant of land from the Legislature, and to aid the other company to procure it by all reasonable and proper assistance, in consideration of a share of the grant obtained. The contract was declared to be void as against public policy. Cassoday, J., delivered the opinion of the court in an able and exhaustive review of the authorities on the subject, to which this court is respectfully referred, and which saves us from further wearying it with extracts from the case cited by us."

And on page 49, the learned counsel again refer to this favorite authority, as follows:

"The contract was that one company should cease nego-

tiation for a land grant, and should render to the other 'all such reasonable and proper assistance as they should be able to give in the premises,' to enable the other company to obtain the grant. And as a consideration, the company so rendering assistance, was to share in the grant after it was obtained. Surely the words 'co-operate in securing a franchise,' used in the said contract of the 9th of August, 1895, are much broader and more liable to abuse in operations under them than the above, and are not restricted by the terms 'reasonable and proper assistance.' Yet in that case, when it was urged that a presumption existed in favor of its legality, and among other grounds, that the assistance might have been publicly given, and in legitimate ways, the court held that the contract was in itself against public policy, and for that reason must be held void, although it might have been and actually was complied with by lawful means."

In view of these strong and impressive statements, the court will pardon a somewhat extended analysis of this case, upon which the learned counsel count and rely so largely, and which is—evidently in their view, perhaps in ours also—their strongest authority under this head; but which yet, as we understand it, in no way affects adversely the position of the plaintiff in the case at bar.

The facts of the case are as follows:

Certain acts of Congress gave grants of land to the State of Wisconsin, amongst other purposes for the construction of a railroad between certain points named. The Legislature of the State granted the lands to the Omaha Company, to carry out the purposes of Congress; but the grant was secured partly through the efforts of other companies who agreed not themselves to apply for the grant, but in every way to aid the Omaha Company to secure it—upon condition that one-fourth, when secured, should be turned over to them. This arrangement between the companies was not made known to the Legislature. The syllabus of the case is as follows: "A contract by railroad companies to refrain from any effort to obtain a

grant of public lands from the Legislature, and to aid another company to procure it by all reasonable and proper assistance, in consideration of a share of the grant obtained by the latter, is void as against public policy." On page 609, the court states the essential grounds of its decisions as follows: "In bestowing the grant the Legislature were executing a trust imposed upon the State by Congress. The Legislature had no power to pervert that trust, nor any part of it, even for the benefit of the State, much less for the benefit of a railway corporation, upon which no part of the grant had ever been conferred, and which owed no duty in the construction or operation of the road in aid of which it was granted. The object of such grant was not only to aid in such construction, but to insure its continued operation. But to sanction such a contract so perverting one-fourth of the grant, might, in a supposed case, leave the contracting party insolvent and without any ability to successfully operate the road. Since the intention of the Legislature is only ascertainable from the grant itself, it necessarily follows that they intended to bestow the grant on the Omaha Company alone. To sanction the contract, therefore, would be to defeat the expressed intention of the Legislature, and to allow the parties to the contract, in advance of the construction of any portion of the road, to parcel out the grant to suit themselves, when, as a matter of fact and law, the trust could only be executed by the Legislature itself, in the name of the State, as a naked trustee, acquiring all of its powers to act at all, directly from Congress."

It is noticeable that the judge who delivered the opinion subsequently appended thereto a note, calling attention to the Statute of Wisconsin making it a criminal matter for any person to attempt in any manner to influence any member of the Legislature for or against any measure, without first making known to said member the real and true interest he had in such measure, either personally or as agent or attorney. The judge very pertinently adds that, since the making of the agreement was punishable criminally, it was idle to contend that it might be specifically enforced in equity; that, if corpo-

rations should be allowed to give or receive money or property for such services, then the privilege should be limited to such corporations as might be chartered especially for that purpose; "for, in that event, they would, in the spirit of the latter clause of the section cited, appear in their true character, and thus enable unwary members of the Legislature, as well as the public, the better to guard against their approach or to escape their allurements altogether."

May we not confidently assume that enough has been said as to this case? Would the opinion have been applicable, could the decision have been rendered, if all the companies concerned had come openly before the Legislature (as the parties did in the case at bar), asking that they should be amalgamated into one company, and that the grant be made to this new company? Is it not evident that, by this course, all the vicious and invalidating elements would have been banished from the case?

43 Cal., 11.

Subject: Contract Against Public Policy.

Nearly in line with this case is the case of *Porell v. Maguire*, 43 Cal., 11, which, though in this court and this connection merely *cited* (see lists of authorities, pages v and 45 of defendants' brief), was, we think, more confidently relied upon and pressed in the courts below, than any other case, as an analogue of the case at bar, in its relations alike to the law of Public Policy and of Equity Jurisdiction. Indeed, on page 62 of defendants' brief in this court, it is said—"The two cases are as much alike as the two Dromios."

It is true that, when read hurriedly, the apparent resemblance between the two is striking; but when closely examined it is seen that the case of *Porell v. Maguire* was a gross and palpable instance of an impudent claim for compensation for "lobby services"; and, moreover, that it was kept "secret" from the Legislature "who the real parties in interest were." On page 13 it is stated that "His whole claim was based upon

the influence, or pretended influence, exerted by him upon the State Senator from that district, in procuring the passage of the bill, but there is nothing to show anything like a partnership between the parties. On his own statement the most he could claim was a half interest in the franchise for "lobby services"; on page 14, that "the rights asserted by the plaintiff were founded in illegality, in that they were based upon a combination to exercise improper influences upon the Legislature in the discharge of its duties"; on page 18, that "the plaintiff through his friendly relations with the senator from that district, was chiefly or wholly instrumental in procuring the franchise to be granted"; on page 21, that "It may be that, if the Legislature had known beforehand who the real parties in interest were, they would not have made the grant; and if the courts could be appealed to, to enforce such secret antecedent agreements, unsupported by any subsequent acts of the ostensible beneficiary, it is evident that powerful secret combinations would be formed to procure vicious legislation under false pretences. What might appear to be a harmless or beneficial enterprise under the control of one person of good character, might prove to be a very dangerous and pernicious scheme in the hands of twenty secret associates of bad character, and to whom the Legislature might have refused to make the grant, if their interest had been disclosed on the face of the bill." We do not deem it necessary further to discuss this case.

4 H. of L. Cases. 1-255.

Subject: Contract Against Public Policy.

Edgerton v. Earl of Brownlow, 4 H. of L. Cases, 1-255, which, in the several arguments below, seemed to be very much relied upon by the defendants, and is referred to several times in their brief filed here (see pages 38, 50, &c.), was a case in which agents were to be paid large sums of money for carrying out the trusts of a will providing for *the purchase of peerages*. But for the lofty character of the tribunal which rendered

the decision, and the evident estimation of it by the learned counsel for the defense, we would not even deem it necessary to refer to the case.

True, the disquisitions upon Public Policy by the great Law Lords who took part in the debate are masterly; but the case is differentiated so widely from that at bar that these statements of general principles cannot be considered as having much weight in the determination of the latter. Perhaps no one of these great lawyers and judges was abler or more experienced than Lord Chief Baron Pollock, who, on page 149, thus epitomized the case and the subject: "The conclusions to which I have arrived from the decided cases and the principles they involve, are that all matters relating to the public welfare—all acts of the Legislature or the Executive—must be decided and determined upon their own merits only, and that it is against the public interest (and therefore not lawful) for any one officiously, wantonly and capriciously, without any motive but his own will, to create any pecuniary interest or other bias of any sort, in the decision of a matter of a public nature, and which involves the public welfare, the party creating that interest having no special and particular individual interest in the subject matter with which he intermeddles."

Could there well be conceived an epitome of a case more widely distinguishable from the case at bar, or a statement of principles more entirely inapplicable to it?

But why prolong this discussion of particular cases? Not only is there, properly speaking, no contingent compensation, no paid agency, here, but there are

No Lobby Services in the Case at Bar.

We do not admit that, even in the original bill, there is any recognition of *lobby services* as contemplated by or rendered under the contract of August 9, 1895; but we do most emphatically assert that, outside of certain loose expressions stricken from said bill by amendment, there is nothing in the case upon which to base even a plausible argument that *lobby services* were ever contemplated or ever rendered by either of

the parties to said contract. Certainly, the facts set out in the last amended bill give no color to the charge.

As we have seen, the test, the defendants' own test, is that **the illegality must clearly appear**. It is interesting to note how, after all their labored argument upon this branch of the case and very near the close of it, the learned counsel wince under the pressure of this test, and recognize the hopelessness of their case upon the amended bill.

In the last paragraph of page 51 of their brief, and in the following words, they sound again the old battle-cry with which they opened the fight:

"But the statements in the original bill turn a flood of light on the services agreed to be performed, and clearly show that they were what is known and condemned by the courts as *obedying*, and that such services were actually performed on behalf of the petitioner."

Thenceforward, to the very end of their discussion of this head, they comfort themselves with liberal quotations from the original bill, and most liberal construction of them.

Our friends are welcome to all the comfort they can derive from this mode of viewing and discussing the case. Meanwhile, we invoke the defendants' test of the legality of the contract, we apply it to the amended bill, and upon this basis we confidently reiterate, with merely formal modification, the proposition which we laid down at the outset, to-wit:

It is not necessarily, nay it cannot possibly, be contrary to public policy for rival applicants for a Legislative charter or franchise to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?

The *second* of the two questions which the law of Public Policy propounds, when applied to the facts of the case at bar, is this—

Whether, after a contract contrary to public policy has been consummated, and the franchise or other benefit contemplated in such contract has been secured, and one party has appropriated all the benefit, and the other seeks justice at the hands of the court and a fair division; whether, we say—under such circumstances—a court of equity and of conscience will entertain and approve the plea of the wrongdoer, that the original contract was immoral or invalid?

It will not be over looked that this question demands no answer at our hands—unless and until the contract of August 9th, 1895, shall be declared violative of a sound Public Policy, which we do not believe will ever occur.

The brief of the defendants concedes the law laid down in *Brooks v. Martin*. Indeed, it cannot well be questioned, having been, as we showed upon page 90 of our first brief, reiterated in many decisions of this honorable court; but the proposition of the defendants is (page 53 of their brief):

This case not within the class of contracts represented by *Brooks v. Martin*.

The learned counsel attempt to establish this position by formulating what they consider to be

THE TEST.

the distinction upon which the cases have turned, to-wit:

"If the ground of relief is a contract subsequent to, and independent of, the illegal contract, and not requiring the enforcement of the illegal contract, it may be enforced." (P. 54.)

We do not care to enter again into this hair splitting discussion, but respectfully refer to our views—as to what this "contract subsequent to and independent of the illegal contract," so frequently referred to in the authorities, really is—which views are fully stated on pages 89–91 of our brief. We beg leave, too, again to call attention to the very able discussion of this entire subject in *Gilliam v. Brown*, 43 Miss., 641–666; and to *Planters Bank v. Union Bank*, 16 Wal., 483–500, especially paragraph 5 of the syllabus and last page of the

opinion, in both which passages this honorable court gives expression to its recognition of the fact that its "doctrine" on this subject is in advance of that of many courts; yet adheres to it in full view of this state of things—the paragraph of the syllabus referred to, beginning "Though an illegal contract will not be enforced by courts, yet it is the doctrine of this court that * * * ;" and the passage from the opinion, reading: "We are aware that *Falkney v. Regnons* and *Petrie v. Hanmy* have been doubted if not overruled in England, but the doctrine they assert has been approved by this court."

We stand, then, upon the doctrine of this honorable court, announced in repeated decisions, and upon our understanding of it, which, in the language of *Planters Bank v. Union Bank*, is that, where the illegal contract has been already executed and the illegal object already accomplished, *the money, or thing which was the price of it, may be a legal consideration between the parties for a promise express or implied; and this is the "subsequent and independent contract" so often and so glibly referred to in the authorities*

We cannot believe that the learned counsel for the defence have failed to apprehend this view of the authorities: for, upon page 56 of their brief, they seek to escape it, by attempting to force an analogy between the conduct of Sheild, in repudiating the obligations of himself and associates to Hyer and associates, and a hypothetical case put by Mr. Justice Miller in his opinion in *Brooks v. Martin*. Said that great Judge: "If Brooks, *after the signing of these articles of partnership*, had said to Martin, 'I refuse to proceed with this partnership because the purpose is illegal,' Martin would have been entirely without remedy." And thereupon, say the learned counsel, "Sheild refused to proceed with the contract of 9th August, 1895, which is illegal, before its consummation, and the defendants have never admitted or assumed any liability under it," &c., &c.

The position seems to us at once monstrous in morals and impotent in law. Passing by the fact that Sheild did not intimate the slightest shrinking from the contract because of its

immorality or illegality, as Brooks is supposed to have done—passing by, we say, the view and purpose with which Sheild repudiated the obligations of himself and associates—how can any one fail to perceive and to appreciate the difference in time and circumstances under which the repudiation takes place in the two instances. Brooks refuses at the outset, at the threshold; as his Honor puts it, “*after the signing of the articles,*” but, of course, presumably *before* the execution of the contract began. Sheild repudiated *after the entire consideration which was to pass from us was in his hands*, and we were stripped and powerless, bound hand and foot. There is no more analogy between the supposed action of Brooks and the real action of Sheild, than there would be between the conduct of a man who refuses to enter my house with another for the purpose of robbery, and the conduct of a burglar who, after robbing my house in company with another, refuses to share with his comrade the plunder they have together secured.

As Lord Macnaghten said of Solicitor Howe, in the Nordenfeldt case, the defendants pleaded that their contract was against public policy, but they forgot to return the price—that they put in their pockets.

When the plaintiff filed his bill, the unlawful contract (for argument sake only conceding it to be such) had been executed, but the parties on one side were in possession of all the benefits resulting therefrom. They should not be suffered to interpose the objection that the contract which produced the benefits was in violation of law. As was said substantially in *Gilliam v. Brown*, *supra*: What law is violated, what rule of public policy is infringed, what encouragement is given to the violators of law, by compelling the defendants to turn over to the plaintiff his equitable share of the proceeds and benefits resulting from his faithful execution of the contract of August 9th, 1895?

REMEDY AT LAW.

Specific Performance.

But, say the defendants, even conceding that you have or had a lawful contract, or such right as the law will recognize

to recover your share of the proceeds and benefits which have been realized from the execution of an unlawful one, yet you have no case in this court—*having a plain, adequate and complete remedy at law.*

In support of this position, the defendants *first* assume that what we demand is a one-half interest in the stock of the Traction Company, *as it stands upon the market to-day*, and that this interest being readily measurable, we can, and therefore we must, sue for it or its value *at law*; and then cite authorities, page 62 of their brief, for the position that courts will *not decree specific execution* of a contract for the sale or delivery of stock "because it is *ordinarily* capable of exact measurement." (Italics ours.)

Our answer is clear, and it is three-fold, to-wit: (a) We have never demanded any such interest, as our pleadings will show; (b) the interest we have demanded and do demand is incapable of any such ready and exact estimate, as we have elaborately shown in our opening brief, notably on pages 107-108; and (c) the authorities generally, indeed some of the very authorities cited by the defendants, recognize exceptions to the general rule which are certainly broad enough to cover our case—indeed, show the 'reason of that rule' to be such as to exclude our case from its operation: thus

COOK ON STOCKHOLDERS (3d Edition).

§ 336. "The vendee's remedy for a failure on the part of the vendor to deliver, is an action for damages, *or* a bill in equity to obtain specific performance."

§ 337 is headed "Specific Performance as a remedy for breach of a contract to sell stock."

§ 338. "If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But, *where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered*, a court

of equity will decree a specific performance and compel the vendor to deliver the stock."

In *Eckstein v. Downing*, 64 N. H., 248, the first paragraph of the syllabus is as follows: "Equity does not decree specific performance of a contract for the sale of shares in a manufacturing corporation, *when it appears that the remedy furnished by an action at law for the breach of it is adequate.*"

In *Bumgardner v. Leacitt*, 35 W. Va., 194, the syllabus is instructive, but we have not time to copy it. Upon page 202, however, the court says: "The question of specific performance of contracts for the delivery of stock is frequently treated by the text-writers in an empirical and unsatisfactory manner, as if there were something peculiar in this character of personal property, which renders it impossible to classify it under any general rule. Mr. Fry, for example, does not hesitate to say positively that a contract for the sale of stock will not be specifically enforced, although he afterwards admits that railway shares form an exception. Fry, Spec. Perf., §§ 24, 27. Mr. Pomeroy's treatment of the subject is equally unsatisfactory. See Pom. Spec. Perf., §§ 17-19.

"The true principle would seem to be that, as a general rule, courts of equity will not enforce specific performance of contract for the delivery of shares of stock, but when a purchaser has bargained for such shares, or taken an option upon them, because they have for him a unique and special value, *the loss of which could not be adequately compensated by damages at law*, the chancellor, in the exercise of a sound discretion, may decree specific execution. This principle we find laid down and insisted upon in the more recent work of Mr. Waterman (1881). 'The same principles,' he says, '*govern in contracts for the sale of stock as in the sale of other property—that is, if a breach can be fully compensated in damages, equity will not interfere; while it will do so when, notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated. If a contract to convey stock is clear and definite, and the uncertain value of*

the stock renders it difficult to do justice by an award of damages, specific performance will be decreed.' Wat. Spec. Perf., § 19."

All the above authorities are cited by the defendants on page 62 of their brief, but the italics are ours.

We regret we have not time to develop our position and trace the authorities further, but the defendants' answer to our opening brief has not been in our hands long enough to admit of thorough preparation of our reply. We trust, however, enough has been said to demonstrate, that it will not do to base the denial of Equity jurisdiction and relief upon the ground that the rights and wrongs of the plaintiff involved a claim to a share in the *stock* of the defendant company (from its inception,) and therefore can be adequately measured and compensated *at law*.

ACCOUNT.

Partnership.

We respectfully submit that the plaintiff is entitled to this equity, *first*, on the ground of the *partnership relation* existing between him and the defendants, and do not feel that the learned counsel have successfully answered the authorities adduced by us in support of this position.

True, in *Powell v. Maguire*, 43 Cal., 11, and *Thomason v. De Greager*, 31 Pacif. Rep., 567, which followed it, cited by defendants, it was held that the circumstances did not entitle the plaintiffs to the position and rights of partners of the defendants respectively. But, it should not be forgotten that in the first-named case the court held the entire agreement between plaintiff and defendant void as against Public Policy, and that the plaintiff, by his own showing, had done nothing, except to render certain lobby services. In the case at bar, on the contrary, the plaintiff has given valuable considerations, and has expended both labor and money in the enterprise.

It is also worthy of note that Lindley on Partnership, § 914, cited by defendants on page 62 of their brief, has a side note in the following words: "General Rule against Specific

Performance of Agreements for Partnership"; that the first sentence of the adjoining text alludes to the existence of "exceptions" to said rule, and that, in the two or three pages following, some of these exceptions are set forth in cases not unlike the case at bar. In some instances, the learned author speaks of decrees being entered *for specific performance and an account*, when it was *not* deemed by the court that the circumstances were such as entitled the plaintiff to be regarded as *in all respects a partner of the defendant*.

A Court of Law Unequal to the Case.

But the strongest possible appeal, not only for the equity of *account*, but also for the general jurisdiction of a court of equity, in the plaintiff's case, is based upon the utter inadequacy of trial by jury and of common law procedure generally to deal with such a case, either in the way of adequate measure of the plaintiff's rights or adequate remedy for his wrongs. Indeed, the argument, if it has settled anything, has shown that even a court of equity, with all its flexible and adaptable machinery, and all its capacity for adjusting delicate equities, by reason of its ability to render conditional judgments and decrees, will find its great powers put to severe test in dealing with the conflicting rights involved in this controversy.

So emphatically is this true, that one of the arguments heretofore employed by the learned counsel to prejudice our case, is the suggestion of the great difficulty in framing a decree which will meet all the exigencies of the plaintiff's case, and at the same time extend even handed justice to the defendants.

In reply to which, we beg leave to say respectfully that, the time has not yet arrived for the consideration of this difficulty. We are just now concerned not so much with remedy as with right. The question is not now—how shall we frame a decree properly adjusted to all the equities of all the parties? That will come by and by, when all the facts are before the trial court. To-day, we are concerned rather with this question:

Has the plaintiff any equitable rights whatever, upon the case made in his last amended bill?

Our Remedy at Law: It is easy to see what the astute counsel for the defense think of it—it is fearful to imagine how they would juggle with it before a jury. In one of their briefs below, they blandly remitt us, for its realization, to the year of our Lord 1926, and in their brief filed in this honorable court (page 63), they suggest the following business-like and alluring calculation of the “damages” to which they consider us entitled:

“To give him in damages, his expenses, and the market value of the stock claimed, less its par value, would give him a *plain, adequate, and complete* remedy.”

Upon this magnificent basis, and with elements such as these, it would require a millennium for a Babbage’s calculator to estimate our receipts. How far *above* “par” do the learned counsel assume the “stock” of this company to be? *On which side of the ledger* would be the balance, if its “par” value be taken from its “market value?” What could more vividly illustrate the delusive and inadequate nature of the remedy which a court of law would give the plaintiff?

On pages 73-75 of their brief, the defendants make the point, properly falling under the head Remedy at Law and sub-head Specific Performance, that the

Contract is Wanting in Certainty and Mutuality.

Certainty.

It is familiar law that the “certainty” required in contracts to entitle them to be specifically informed, is only “*reasonable certainty*,” and we do not believe that any unprejudiced man can read the contract of August 9, ’95, and feel that it is lacking in this degree of certainty. One unacquainted with the law might be misled by the suggestion that the associates

of Hyer and of Sheild are not named; but every lawyer would at once recognize that silence as to such a feature, which can at any time be broken by proof, is not such lack of certainty as the law reprobates. In all other respects, the contract is unusually clear and explicit.

The learned counsel cite but three authorities on the requisite of "certainty"; to say the least, they do not strike us as fortunate citations. They are as follows:

Pomeroy's Equity, §1405, which expressly embodies the modifying, practical word above referred to: stating that the requirement is only that the contract be "reasonably certain."

Colson v. Thompson, 2 Wheat, 336, employing the same modifying word; holding that the terms of the contract "should be so precise that neither party can reasonably misunderstand them." And from the opinion it appears, in strong contrast to the definite provisions of the contract of August 9, 1895, "that the amended bill states * * * that no particular stipulation was made respecting the compensation which he (the complainant) was to receive for his services, except that the general custom of the country in similar cases and the general tenor of the complainant's contracts with other persons for such services were to furnish the rule of compensation to be allowed him."

It need scarcely be suggested how difficult, or rather how impossible, it must be to enforce specific performance of such a contract. But this is not all. The bill did not go off on demurrer, but the defendant answered, and in his answer stated that "no contract of any sort was entered into between the complainant and himself." Is it to be wondered at that specific performance was refused?

Hissam v. Parrish, 24 S. E. Rep., 600.

As to this authority, the defendants' brief, on page 74, makes an elaborate and rather impressive statement, but when the case is carefully read the conclusion to be drawn from it is, we think, very different from what the learned counsel intended.

The following is an extract from the opinion in that case as to the requisite of "certainty": "It is true that the plaintiff alleges in his bill that, before the creation of said corporation and formation of said company, the defendants, for the purpose of creating said corporation and inducing him to take stock in said company to the amount of eight shares, of \$100 per share, entered into the contract which is sought to be specifically enforced; but there is nothing of that kind appearing in the contract, which is made part of the bill, and we must look to the contract for its terms and parties, and, so far from being made before the corporation was formed, on the face of the contract the "Milton Manufacturing Company" appears to be made party of the second part, although it is signed by the defendants; and for this reason said contract cannot be considered reasonably certain as to its parties, and for these reasons my conclusion is that the court erred in overruling the demurrer."

It is obvious that the elements of uncertainty, which prevented the contract from being enforced in that case, do not characterize the case at bar. It is not true of our contract that one party is recited in it as party of the second part, while perfectly different parties sign it as parties of the second part; nor is it true of our case that the contract itself fails to contain statements explanatory of its purposes and provisions, which it is yet found necessary to incorporate in the bill. The contract in the case at bar is perfectly clear and distinct in these particulars.

Need we discuss further the requisite of "certainty" in the contract of August 9, 1895? Are we not authorized to say that this feature of that contract is brought out in strong relief against the dark and confused background of the authorities cited by the defendants? No chancellor, as we believe, would hold this contract unenforceable because of the lack of certainty in its terms and provisions, and especially not *upon demurrer*.

Mutuality.

But, say the defendants, a contract to be enforced must be *mutual*—i. e., characterized by *mutuality of obligation*. Hyer's

obligations were to withdraw the Conduit franchise and to co-operate with the Traction side in procuring another, and manifestly no court could compel him to do either of those things.

We fail utterly to appreciate this reasoning.

Certain parts of this contract of August 9th would doubtless have proved, if the attempt had been made, very difficult to enforce. Co-operation in a partnership enterprise is an awkward thing to compel, but neither side, in the case at bar, has asked anything of the sort. The basis of the antecedent considerations upon both sides being complied with, one side was and would have been equally as compellable as the other to let that other into a one-half interest in the franchise and enterprise. It was not properly a contract upon Sheild's part that he would give Hyer a one-half interest in his Traction franchise (at the time he had none), if Hyer would do certain things. They met as equals; both were to co-operate, and certain specific services were to be and were rendered by Hyer; but beyond this co-operation and these services, Hyer and Sheild, each for his side, agreed that they would share equally in the enterprise. Neither side accuses the other, so far as the record shows, of any failure of co-operation. No such phase of the agreement is before the court. We come then to the contract obligation, which we do ask should be specifically enforced. What was it but a contract of equals that they would share equally? If Hyer had eliminated and excluded Sheild from participation in it, the contract of August 9, 1895, would have been just as enforceable in Sheild's behalf, as we claim it now to be in Hyer's.

The position that this contract is lacking in the requisite of "mutuality" seems to be founded on such a total misapprehension (as we have above attempted to show), that it can scarcely be necessary to examine the authorities cited in support of it; yet we will briefly advert to them, as follows, to-wit:

FRY ON SPECIFIC PERFORMANCE, § 286.

"A contract to be specifically performed must be mutual; that is to say, such that it might at the time it was entered into

have been enforced by either party." This limitation of the required mutuality, to the time the contract was entered into is explained by the last proposition of the syllabus in *Moore v. Fitz Randolph*, 6 Leigh, 175, also cited in the same connection, which is as follows: "The rule, that equity refuses specific execution of contracts where the remedy is not mutual, applies to cases in which there is not such mutuality of remedy at the time the contract is made; not to cases in which the mutuality of remedy is taken away by a subsequent contingent event."

Smith v. Applegate, 3 Zab. (N. J.), 352, is entirely inapplicable. The court, in that case, merely emphasized and illustrated its view, that the contract could not be enforced in favor of the side that sought to enforce it—by the consideration that, upon the other side it was yet more clearly void, as contrary to Public Policy.

Hissam v. Parrish, 24 S. E. Rep., 600, is cited as an authority upon the requirement of "mutuality" also; but, in order to appreciate the entire lack of mutuality in the contract sought to be specifically enforced in this case, it is only necessary to read it, as set out on page 601, and then to read the following brief extract from the opinion of the court, on page 602—to-wit: "The bill, however, omits to state that the purchase by the defendants of his stock at that price was to be *at plaintiff's option*, which appears on the face of the contract." (Italics ours.) We have attempted to show that there was entire mutuality in that clause or phase of his contract which the plaintiff brought before the court and asked to have specifically enforced, while in *Hissam v. Parrish* the court, on page 602, further said: "The portion, then, of the contract which the court was asked specifically to perform, is that in reference to the purchase of the plaintiff's eight shares of stock; but, in that portion of the contract, as we have attempted to show, there is no mutuality and no consideration."

Is it too much to say that the case of *Hissam v. Parrish*, like the other authorities cited by the defendants as to the requisites of "certainty" and "mutuality," serves well to de-

monstrate how free from objection is the contract in the case at bar in both these respects.

The case is with the court; but in submitting it, may we be allowed a single suggestion, always appropriate upon demurrer—doubly so where, as here, the fate of that demurrer depends upon the validity of the contract, as affected by Public Policy; where the contract will be sustained unless its invalidity clearly appears, and where, if capable of two constructions upon one of which it may be held valid, the law requires that construction to be adopted which will validate it.

In such a case, if the court shall lean a little further in favor of the contract than the facts as hereafter developed shall justify, the defendants will merely have been postponed in the vindication of their rights; but if the court shall fail to give the contract the most liberal and favorable construction of which it is capable, the loss of the plaintiff's rights will be final and fatal.

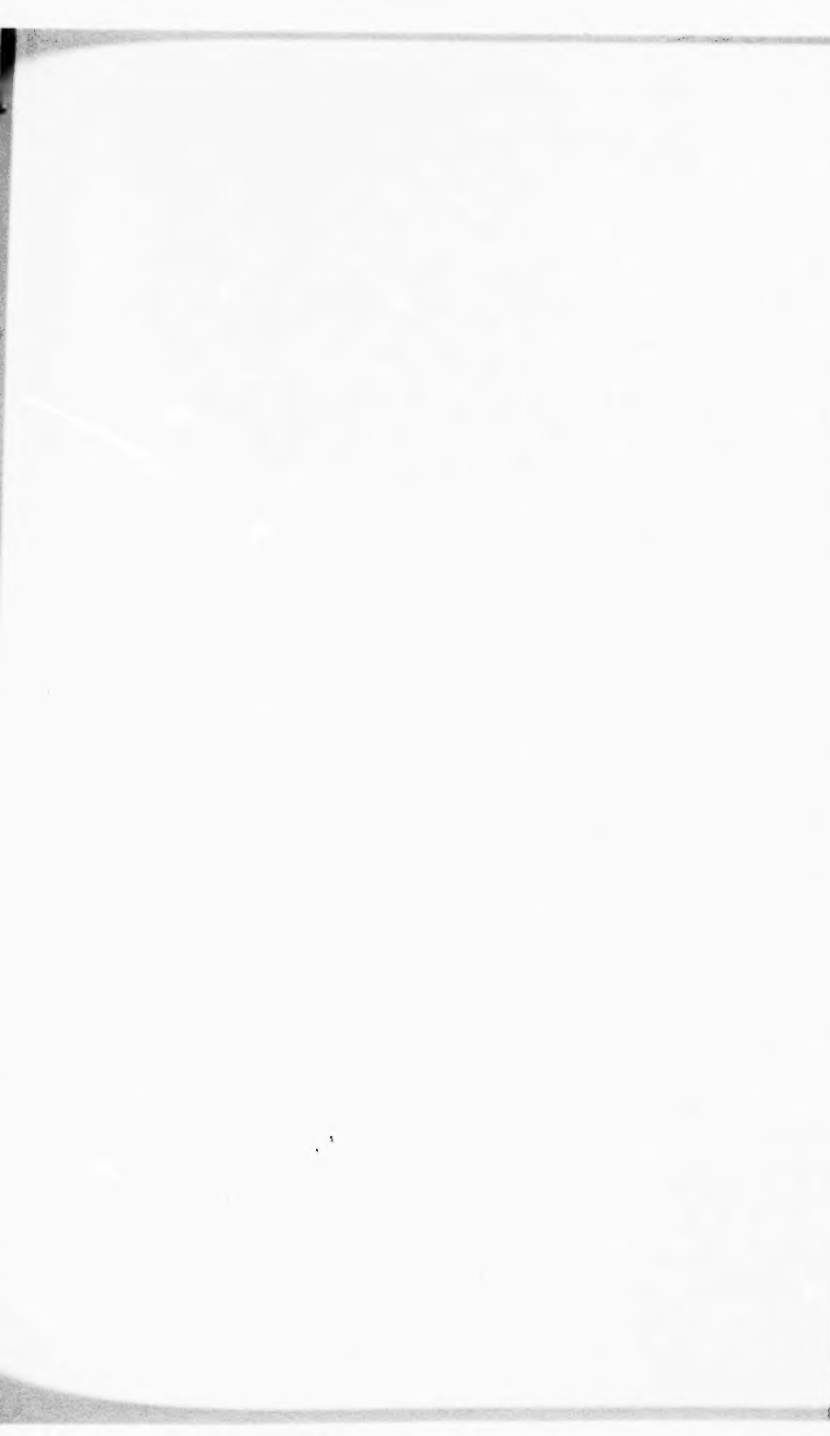
Respectfully Submitted,

ROBERT STILES,

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for Petitioner L. H. Hyer.





APPENDIX.

The six grounds of demurrer on which the defendants still rely will be found listed on page 18 of their brief. On account of entire change in their form and arrangement, we have felt it best to reply to the first *three* of these grounds in our brief proper, being the only ones which, in our view, embody points likely to prove of weight in the solution of the case.

There remain, therefore, to be herein considered, grounds 4, 5 and 6, as per the new table of defenses above referred to. We will take up and discuss these briefly in order; and first—

Ground 4 in new Table of Defenses

(Grounds VIII and IX in old.)

Plaintiff's conduct and the relief he asks inequitable.

We stand upon what was said in our opening brief, Appendix. pages 124-125, in answer to grounds VIII and IX.

If it be deemed desirable to add anything, we would say, after reading defendants' elaborate, distempered, confused and inconsistent indictment of the plaintiff under this head, that to "the jaundiced eye" of the learned counsel—"eye to which all order festers," "eye to which all good is bad"—everything our unfortunate client has done in the premises, and equally everything he has not done, makes proof as strong as Holy Writ, to convict him of having *unclean hands* and an *impure heart*.

We do not believe a Court of Equity will take this prejudiced view of the plaintiff's case. It will rather adopt what would seem, upon demurrer at least, to be *the more natural construction of his conduct*, to-wit: that the plaintiff—a stranger, struggling single-handed against a powerful combination, which,

after getting out of him benefits and advantages not only important but vital to their success, met him with impudent denial of his claims—determined, at first of his own judgment but afterwards confirmed and developed by counsel, that the best and safest course was to give full notice of his rights at every step, and to file a bill asking every appropriate form of relief, but not pressing any of these to extremity, or to the possible ruin and destruction of the enterprise in which he claimed to be interested—especially in view of the fact that the defendants had demurred to his bill upon grounds going to the very foundation of his rights.

Ground 5 in new Table of Defenses.

(Substantially identical with Ground V in old.)

The contract is one between promoters, which cannot be enforced against the defendants.

We rely upon what was said in answer to this point in the Appendix to our opening brief, pages 116-122; and regret that we have only time, in addition, to say that we do not agree with the learned counsel in their limitation of the effect and operation of the *equitable estoppel of the corporation* (by receiving the benefit of the contract made with its promoters) to *third parties*; so as to exclude a person standing in such relation to the corporation as our client stood to the defendant company. We have seen nothing in the authorities so limiting the principle, and there is neither sound reason nor good morals in the limitation.

In addition to the authorities before cited by us, see Thompson on Corporations, §§ 480, 481, agreeing substantially with Morawetz, §§ 547, 549; *Weatherford, &c., v. Granger*, 86 Tex., 350; *Empress Engineering Co.*, 16 L. R. Ch. Div., 125, especially the opinions of Sir Geo. Jessel on page 129, and of Lord Justice James, page 130.

Ground 6 in new Table of Defenses.

(Ground VII in old.)

Quo Warranto our Remedy.

We stand upon what was said in our opening brief under this head, Appendix, page 124. If there is anything in the point calling for further notice, we are laboring under entire misapprehension with regard to it.

Respectfully submitted,

ROBERT STILES,

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No. 379. + Whitelock
Brief of Henry, for Respondent
Filed Oct. 13, 1897.
IN THE

Supreme Court of the United States.

October Term, 1897.

No. 379.

L. H. HYER, Petitioner,

v.

RICHMOND TRACTION COMPANY, et al.

**ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

**Brief of Certain Appellees in Reply to Brief
for Petitioner.**

**W. W. HENRY,
E. R. WILLIAMS,
S. D. SCHMUCKER,
GEORGE WHITELOCK,**
Counsel for the Appellees.

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IN THE
Supreme Court of the United States.

October Term, 1897.

No. 379.

L. H. HYER, PETITIONER,

VS.

RICHMOND TRACTION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Brief of Certain Appellees in Reply to Brief for
Petitioner.

STATEMENT OF CASE.

The original bill in this case was filed by L. H. Hyer in the Circuit Court for the Eastern District of Virginia, at Richmond, on the 30th October, 1895, to enforce against the defendants the following contract, found at top page 6 of the Record. (See prayers of bills, pages 16, 17, 42 and 111.)

NEW YORK, August 9th, 1895.

S. H. G. Stewart, Esq.,

40 Wall Street, City.

Dear Sir,—We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad Street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

Yours very respectfully,

[Signed] L. H. HYER.

[Signed] PHIL. B. SHEILD.

The plaintiff afterwards filed amended bills, hereafter to be noticed, but all of his bills were dismissed on demurrer by

Judge Goff, sitting in the Circuit Court (page 119). Thereupon he appealed to the United States Circuit Court of Appeals, at Richmond, Va., which Court affirmed the decree of the Circuit Court (page 145). The case is here now on *certiorari* granted on the petition of the said L. H. Hyer.

In order to a proper understanding of the said contract and the grounds of defence, the circumstances leading up to it, the acts of the parties in execution of it, and the conduct of the complainant in the conduct of his suit should be related. And this is the more important as the opening brief filed for the petitioner is very defective in its statement of material facts, and misleading in some of its parts. On behalf of those of the defendants represented by us, we therefore submit the following as an accurate statement of the facts disclosed by the record, condensing without omitting what is deemed material to the cause:

On the 17th of June, 1895, an ordinance of the Council of the City of Richmond was approved by the Mayor, which granted to L. H. Hyer and his associates, under the corporate name of the Richmond Conduit Railway Company, a franchise to construct and operate a street railway along Broad street and connecting streets in the said city. (Record, top p. 84).

Owing to certain provisions in said ordinance, not approved by the said Hyer, he declined to accept the same without certain amendments which he proposed, and which he was assured by the Committee on Streets of the said Council would be engrafted upon the ordinance, provided he would procure to be deposited in one of the banks of the city of Richmond the sum of ten thousand dollars upon conditions embodied in a paper to be prepared by the City Attorney, which deposit he caused to be made in the State Bank at Richmond (pp. 84-85). Said amendments had been in fact adopted by the said Street Committee (p. 89). The word "Conduit" is a technical phrase which indicated, that the proposed motive power in the scheme presented by Hyer, was to be electricity along wires placed underground, by what is known as an "underground electric system." See Booth on Street Railways, §66. While the

said ordinance and its proposed amendments were pending, a rival and competing scheme was presented to the said Council by parties represented by the appellee, P. B. Sheild, who sought the said franchise for an electric street railway along said Broad and connecting streets under the name and style of the *Richmond Traction Company* (pp. 3 and 85). These parties proposed to build an electric street railway of the overhead trolley system (pp. 6, 87 and 21). The said competing schemes were therefore to have their propelling power applied in different ways, the *one underground the other overhead*.

There were other grounds of competition also. By the Act of the Virginia Legislature of 20th March, 1860, under which the Council of Richmond was authorized to contract for railroads in its streets, such contracts were to be "under such provisions, limitations and restrictions as the Council may prescribe." (See appendix to brief.) In prescribing these the City Council would of course seek such conditions as would be most valuable to the City. And in the interest of the public, in case of competition, such provisions, as the rate of taxation measured by commissions on receipts, the rate of fares for school children and others, and the amount of work to be done on the streets, would be put up to the highest bidder.

In this competition the petitioner and his associates seemed at first to have, in his own language, "the inside track," and to be "masters of the situation" (p. 4). The policy of Shield under these circumstances is thus described by Hyer: "If Sheild, for his Traction people, could but get the conduit franchise out of the way, get the use, the benefit, or the credit of their \$10,000.00, and also get the conduit workers, who seemed to have the ear of the Council, committed to the traction scheme, the field was won; otherwise there was no chance. There was but one way to accomplish these ends, viz: to embarrass as much as possible the progress of the conduit scheme, and to promise everything to its promoters if they would agree to the substitution of the Traction ordinance in place of theirs. And this way was adopted" (pages 7 and 8).

For the purpose of carrying out his proposed contract with

the city under the said ordinance, to be amended as aforesaid, the petitioner had secured the co-operation or assurance of adequate capital (page 84). In the early part of August, 1895, he was in the city of New York engaged in *perfecting* his arrangements for prompt and vigorous action under his *conduit ordinance*. He was introduced by Mr. Stewart, his banker, to the said P. B. Sheild, who had applied to the same banker for aid in behalf of the proposed Richmond Traction Company scheme. This introduction was at the solicitation of the said Sheild, who declared that he desired if possible, to consolidate the interests of the two companies, and the circumstances are thus described in the original bill (page 5):

"The said Stewart then advised your orator (the petitioner) that rivalry between the conduit company and your orator and his associates on the one hand, and the Traction people and the said P. B. Sheild and his associates on the other hand, and antagonism of this character, would probably result in the defeat of both their schemes, or the passage of the franchise in favor of one of the two competitors loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise, and he therefore urged your orator to shake hands with the said Sheild, to unite forces with him upon one of the two ordinances—the Conduit ordinance or the Traction ordinance—and thus to secure and share the fruits of victory instead of the disappointment and bitterness of defeat. Mr. Sheild and your orator, realizing the wisdom of this council, were then and there introduced by Mr. Stewart, and after some conference, parted to meet later at your orator's hotel, having arrived at a general agreement that the promoters of the Conduit scheme, represented by your orator, and the promoters of the Traction scheme, represented by the said Sheild, co-operate and share equally in the profits of the enterprise. The late rivals, now allies, met as arranged. * * The result of this conference was embodied in a contract which took the form of a joint letter * * to S. H. G. Stewart." (See letter, page 6, heretofore recited.)

The actual expenses to be repaid to the petitioner under this agreement are stated to be between \$3,500.00 and \$4,000.00 (pages 2 and 84). The petitioner, after the signing of the said contract, endorsed upon a draft of the Traction ordinance, a request or direction to his friends in Richmond to give it their hearty support. Upon the request of Sheild that the names of the petitioner and of one or two of his associates be furnished to insert in the ordinance, the petitioner the next day wired to his friends in Richmond the names he had selected, one of whom was then in Richmond at work on the Conduit scheme, "who, with your orator's entire working force, went over at once to the Traction side openly and heartily" (page 8). "The Conduit ordinance was publicly withdrawn before the Street Committee, in the presence of workers from both sides" (page 8). For a day or two subsequent to the signing of the said contract, Sheild and Company several times wired the petitioner as to sundry details, especially urging him to see that the \$10,000.00 on deposit in Richmond should be detained there till the meeting of the Council, which was done, though he did not receive the telegrams, having gone to Washington (pages 9, 90, 91), and being there detained by sickness. In the last amended bill, filed after the demurrer to the original raised the question of public policy, much of the language of the original bill above cited is omitted, as *loose and careless expressions* (page 73), and other words are added, with the expressed purpose of correcting any impression that other "than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract." But in making the changes, the effort was also made to cover up this competition and the motives which led to its withdrawal. For instance, the following is the account of the arrangement between the parties given in the last amended bill (page 88):

"Hyer agreed that the Traction ordinance should take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the city of Richmond, and Sheild,

acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the city of Richmond the franchise set out in said contract of August 9, 1895, and your orator was to keep the \$10,000.00 in Richmond until the 17th day of August, 1895, but subject to the conditions set out in said contract." So (page 86) the reasons advanced by Stewart for uniting on one of the ordinances are omitted, and simply his advice to do so is stated. Then again all about "the inside track" and "the working force of the petitioner," and Sheild's "want of influence with the council," contained in the original bill, is omitted. These changes will be reverted to in the argument, however, and need not be now fully set forth here.

On the 14th day of August the appellant sent his associate, William H. Duehay, to Richmond to learn the situation. He arrived the day that the Board of Councilmen met to consider the proposed Traction ordinance, which was duly passed by that branch of the Council. And afterwards the said Duehay returned to Washington and reported to the appellant that the situation was not satisfactory (pages 9, 90-91). Thereupon the appellant, on or about the 23d of August, came to Richmond, interviewed said Sheild, and they came to an open rupture (pages 10, 91-92). Afterwards, on the 26th day of August, 1895, on the night of which day the Board of Aldermen was called upon to act, and did act upon said ordinance, the appellant published the following card in the "State" newspaper, a paper published in the afternoon in the city of Richmond, thereby giving no opportunity for a public reply before the meeting (pages 11, 92-93):

"MR. HYER CHARGES DISAGREEMENT AMONGST TRACTION COMPANY'S PEOPLE—THREATENS TO BRING SUIT."

"Mr. L. H. Hyer, one of the interested parties of the Richmond Conduit Company, and the fully authorized attorney and agent of that Company, was seen by a reporter of the *State* and asked if he was interested in the present Traction Company's franchise, now before the Board of Aldermen.

To which he replied that he had a contract with the Traction Company for one-half interest of their franchise, when such franchise was granted."

"What is the consideration of this contract you hold?"

"I was to cause the withdrawal of the Richmond Conduit Company's application for franchise in favor of the Traction Company, which was done in due form before the Street Committee. There are a few other minor details, all of which have been complied with."

"Is the Traction Company under contract with any one else?"

"I am reliably informed they are."

"What do you know of these other contracts?"

"One is with Stewart & Company, Bankers, No. 40, Wall Street, New York, who, I am informed, hold a binding proposition for one-third interest in the franchise, and I have reason to believe that an effort will be made on the part of Stewart & Company to hold the Traction Company to this proposition. I am also informed that on the 19th of August a contract was entered into with W. F. Jenkins, the terms of which, it is said, are that he is to have about one-half interest in the franchise for his services in securing the said franchise. It has also been stated to me that the Company has agreed to turn over to certain bankers of this city the greater portion of this franchise for financing the same."

"What is your idea of the outcome of these complications?"

"I can only answer for my associates and myself. If the Board of Aldermen pass the franchise to-night, as I hope and believe they will, it is my intention to retain able counsel before leaving the city to prevent any further transaction on the part of the Traction Company, from bond or stock transfers, until they have complied with the terms of the contract."

"I should infer from the above that there is lack of harmony in the Traction Company?"

"My impression is that all of these conflicting contracts have caused discord among the parties at interest, and I am afraid

these complications will lead to litigation which will prove fatal to the enterprise, which I will regret to see with my financial interests at stake.

"I have just received a telegram from Stewart & Co., of 40, Wall Street, New York, saying they have a binding contract dated August 9th."

On the evening of the 27th of August Mr. John Skelton Williams, afterwards President of the Traction Company and a member of the firm of John L. Williams & Sons, the largest stockholders, published in the same newspaper the following reply, (pp. 13, 94):

"I never heard of Mr. Hyer until he came out in *the State* evening's *State* with those preposterous statements. I immediately took the matter in hand to see whether there was the slightest foundation for them, and was not long in satisfying myself that his claims could not be sustained, that his action was based on the flimsiest assumptions, and was probably inspired by the enemies of the Traction Company, who hoped to spring this surprise last evening at a critical time, with the object of casting doubts upon the plans and purposes of the Richmond Traction Company. His statements are not worthy of any attention."

"Will his threat of employing counsel to defend his rights in the matter interfere in any way with your plans?" was asked Mr. Williams. "Not in the slightest degree," he replied. "It may really be said we have already begun our work, that is to say, the office work, the engineering work. The preparation of plans, and so forth, is already now well under way, and very soon after the Mayor attaches his name to the ordinance, and it becomes a law, the actual physical construction of the road will be at once begun, and pushed to completion much more rapidly than the time allowed in our franchise. We shall pay no more attention to Mr. Hyer than we would to some unconcerned and disinterested person who might appear on the scene now for the first time and request a gratuitous interest in our enterprise."

The ordinance was approved August 28th, 1895, and was in force from its passage (pp. 17 to 26). (" Ordinances and Certain Resolutions of the Council of the City of Richmond, July 10th, 1894, July 1st, 1896"—page 78.) By the provisions of the said act of the 20th of March, 1860, the persons named in the ordinance as permitted to construct and operate the said Street Railway were created a corporation *instantly*, with the power and duties as such, and for the time prescribed by their agreement with the said Council, and were governed by the provisions of chapters 56 and 57 of the Code of Va., of 1849, in force at the date of the said Act, so far as the same were applicable to such corporations and not inconsistent with said Act. By Section 4 of the said Act the corporators were authorized to open books of subscription for stock of the said Company "at such places in the City of Richmond, for such time, and on such advertisement as may seem best to them." And by Section 5 of the said Act the Company was authorized "to borrow money and issue bonds, bearing interest, at not exceeding 8 per cent. per annum, and secure the same by a deed of trust or mortgage upon the whole or any portion of their property, and to use the money for the purpose of building and construction." By the said ordinance, paragraph 2, page 18, the Richmond Traction Company was required to begin its work on Broad Street within ten days from the time the ordinance took effect, to-wit: by the 7th of September, 1895, push the same diligently without interruption or cessation towards conclusion, and within nine months from the date of the ordinance have its cars in operation upon the said entire Broad Street route. But before beginning said work the Company was required to deposit ten thousand dollars in city bonds or U. S. currency with the Treasurer of the city, the said amount to be forfeited to the city if the Company failed to begin its work within the said ten days, or to complete the same within the said nine months. This was a different sum from that mentioned in the contract then *to the credit of the depositor* in the State Bank and to remain there until the 17th of August, for this sum was to be subsequently deposited *with the*

City Treasurer and to be subject to his order. And the Company was also liable upon such failure, or upon the failure to properly prosecute the work with due diligence for the space of ten days during the said nine months, to forfeit to the city each and every one of the privileges granted in the said ordinance, and also all of its track which it might have laid.

A notice, dated Richmond, Va., September 3, 1895, was served on the corporators of the said Richmond Traction Company, but at what time served does not appear, in the following words (pages 14, 95):

“RICHMOND, VA., September 3, 1895.

“To John W. Middendorf, John L. Williams, Everett Wadley, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins, and through them to each and every party, who, on or since the 9th day of August, 1895, has been associated with them, or with any or with either of them, in the premises.

“Take notice, that L. H. Hyer, in behalf of himself and associates, claims to be entitled to a full one-half interest in the franchise recently granted by the City Council of the city of Richmond, Va., to John W. Middendorf, John L. Williams, Everett Wadley, R. Sherreffs, P. B. Sheild, C. T. Child and W. F. Jenkins and associates, to build and operate an electric street-car line in the said city, on Broad and other streets, said interest being claimed under a contract bearing date August 9, 1895, entered into between P. B. Sheild and associates, through P. B. Sheild and L. H. Hyer, in behalf of himself and associates, one original of which is in the hands of said P. B. Sheild and one is in the hands of Stiles & Holladay, Attorneys at Law, 1014 East Main Street, Richmond, Va., the latter being open to your inspection: and, if the rights of the said L. H. Hyer and associates are not recognized and conceded, that they intend forthwith to apply to the courts to enforce their rights in the premises.

“This formal notice is not intended as an implication or

even admission that you have not all along been aware of the rights and claims above asserted.

“L. H. HYER,
“By Stiles & Holladay,
“Attorneys.”

The third amended and supplemental bill (page 99) alleges that some time in September, 1895, the incorporators met at the banking house of John L. Williams & Sons, in the city of Richmond, signed their names to a subscription list, by which they agreed to take three hundred thousand dollars of the capital stock of the Company, which was the maximum allowed by the said act of the 20th of March, 1860. Notwithstanding the notification in the said notice of the 3d September to the incorporators, that if the rights of the said L. H. Hyer (the appellant) and associates were not recognized or conceded, they intended to enforce their rights in the premises; and notwithstanding the fact that the defendant company was required to commence its work by the 7th of September, and of course previously to organize and to make monetary arrangements, and to make contracts and to purchase material before that date; and notwithstanding the fact that the complainant and his associates were notified by the said card of the said John Skelton Williams, of the 27th of August, that their claim to one-half of the franchise granted the Traction Company would not be allowed, it was the 30th day of October, 1895 (page 1), before the appellant, L. H. Hyer, describing himself as a citizen of Missouri, while his contract described him as a citizen of Washington, D. C., filed his bill against the incorporators, together with A. B. Guigon, Edmund Pendleton and Louis Euker, said to be interested in the trust imposed in W. F. Jenkins' trustee, defendants. This bill claimed for Hyer alone, one-half of the said franchise (pages 14-15), the said claim being based upon alleged transfers from his said associates, but neither the said transfers nor the names of his associates are given, except the name of W. F. Jenkins for himself and as

trustee for certain persons; and it is alleged that the said Jenkins had abandoned said rights, and that they no longer exist against or in diminution of the rights of the appellant. The contracts between the appellant and his associates are not given.

In the said original bill the appellant plainly stated that the Richmond Traction Company was a *rival and a competitor* for the control of the said Broad Street franchise; and that the appellant and his associates were *masters of the situation* (page 4). He also stated that the object of the said Sheild in seeking the said alliance was to get the Conduit franchise out of their way; to get the use of the ten thousand dollars deposited; and "also to get the Conduit workers, who seemed to have the ear of the Council, committed to the Traction scheme" (page 7). The appellant also stated that after the said agreement and upon his direction *the appellant's "entire working force went over at once to the Traction side openly and heartily;"* and that "the Conduit ordinance was openly withdrawn from the Street Committee in the presence of workers from both sides" (page 8).

The said original bill, after setting out the said contract, publications, notice and ordinance (pages 6, 11, 13, 14 and 17), claimed a full one-half interest in the Traction Company's enterprise and franchise, and prayed that "each and all of the parties defendant, their agents and servants, be enjoined and restrained from transferring or encumbering the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said Company, or in any other way borrowing money upon its franchise or property;" and for specific enforcement of said contract and general relief (pages 16, 17).

On the 31st day of October, 1895, the day after said original bill was filed, a general demurrer was filed on behalf of defendants (page 27). On the 14th of November, 1895, leave was granted the appellant to amend his bill in certain particulars (pages 26, 27).

The said original bill was signed by the appellant in person (page 17), but none of the several amended bills has

been so signed. Neither the said original nor amended bills have ever been presented to a judge in vacation or in court with an application for immediate injunction until the final hearing on the 5th of May, 1896, when the case was argued upon demurrer (page 119), and when the work of construction on Broad Street was about complete. But without asking for a hearing of the demurrer, on the 4th day of February, 1896, the appellant, by leave of court, filed an amended and supplemental bill, which was at once demurred to, and the said demurrers were set down for argument during the then term (page 29). The said amended and supplemental bill alleged for new matter, that the said corporators, without following the requirements of law by giving legal notice of the time and place, had met and subscribed among themselves to all of the capital stock of the said Traction Company; that no actual payment had been made therefor; that an illegal organization of the Company had been had (pages 32-33); and that on the 1st day of November, 1895, the said illegal organization had directed the issuing of bonds to the amount of \$500,000, and of a mortgage upon the property of the Company to the Maryland Trust Company as trustee to secure the same; and had directed a negotiation and a sale of the said bonds (pages 34 and 35), and filed as an exhibit a copy of the said mortgage (pages 45 to 63). All of these acts the appellant charged were unlawful and were done with an intention to hinder, delay and defraud the appellant (page 36). Whereupon the appellant charged that all persons participating in the said meetings, either in person or by proxy, were jointly and severally liable to him for all loss that might result from their action. As an evidence of the fraud claimed to have been perpetrated, the appellant cited the provision in the bonds (page 39) whereby the "holder agrees that no recourse shall be had for its payment to the individual responsibility of any stockholder, director or officer of the mortgagor by reason of any liability whatsoever incurred by or imposed on him by virtue of any law or statute which may now or hereafter be in force," a provision also contained in the mortgage.

The said amended and supplemental bill charged that the appellant would be exposed to irreparable injury as follows :

“ Yet, notwithstanding the personal liability of the said parties to him, your orator is advised and charges that he will be exposed to irreparable injury, unless the court interfere by injunction to prevent the further negotiation and sale of the bonds issued by the Richmond Traction Company and the further expenditure of the money received for such sale, and the making and execution of contracts in its name, and appoint a receiver to take charge of all property and assets of the said Company.” (p. 42.)

And the appellant prayed for the relief asked for in his original bill ; that the said subscriptions to the capital stock of the Richmond Traction Company be decreed to be illegal, null and void ; that the script for the same be delivered up and cancelled ; that the organization of the said Company be vacated as illegal, null, and void ; that the said mortgage be set aside as illegal, null and void ; that all the bonds secured by it which had been negotiated and sold, be called in and cancelled ; that persons participating in said illegal acts be held liable for all loss and damage which had accrued, or might thereafter accrue to him ; that said Richmond Traction Company and its franchise be discharged from all contracts, debts and liabilities contracted in the name of the said Company ; that the said Maryland Trust Company be restrained from performing its duties as trustee under the said mortgage, and from selling or otherwise disposing of any of said bonds ; that a like injunction be issued against the Richmond Traction Company and its agents, which injunction shall extend to the exercise of any of the rights, powers, functions or privileges of said corporation ; and that a receiver be appointed to take charge of all the property and assets of the said Richmond Traction Company, of whatever character and wherever it may be found and for general relief. (pp. 43-44).

Taken in connection with the prayer of the original bill, which was repeated, the prayers of the appellant were for the

annulment of all obligations of the Richmond Traction Company, and a division of its assets into two parts, one of which should be decreed to the appellant. Upon the filing of this supplemental bill, to-wit: on the 4th of February 1896, the defendants filed a demurrer and specified the causes therefor under nine heads (pp. 63, 64).

Whereupon on the 11th day of February the Court ordered a hearing of the cause on the first day of April, 1896. In the meantime, the appellant, realizing the force of the demurrer, as stated under the said heads, presented a petition to the Judge of the Circuit Court which was granted by an order of the 6th of April, 1896, asking leave to amend his original and supplemental bill by striking out from the same, amongst other expressions, statements relating to *competition* between the two companies seeking said franchise, *the influence obtained* over the Council by the *working force* of the Conduit Company, and the turning over of the said *working force* to, and its working in favor of the Traction Company *with the Council*, after the said contract of 9th of August, 1895; in fact attempting to eliminate all statements which had admitted illegal conduct on the part of the appellant and his associates, in fulfilling their contract of the 9th of August, as has been stated.

The appellant asked leave also to insert new matter on the same line, and also charged (pp. 76-77 and 106-107), that the said Act of the Va. Assembly of 20th March, 1860, was "unconstitutional and void, so far as it undertook to delegate to the City Council of the City of Richmond the authority to prescribe and define the powers and duties of the Richmond Traction Company, and that all the powers attempted to be conferred by the said act on Companies to be formed under it, save and except the power to construct railroads in the streets of said city, are void, because they are not embraced or expressed in the title of said Act, as required by section 16 Art. 4 of the Constitution of Virginia in force at the time of the passage of said Act, which said section provides that "no law shall embrace more than one object which may be expressed in its title."

The title of said act is: "To authorize the Common Coun-

cil of the city of Richmond to authorize persons to construct railroads in the streets of said city." They also inserted (p. 106) the allegation that the said mortgage was executed in violation of section 1232 of the Code of Va. 1887, which forbids certain companies to borrow money until they have expended the whole amount of capital stock subscribed. The petition to amend was granted and a hearing fixed for the 6th day of May, 1896. To the bill so amended the defendants filed a demurrer, specifying for cause the same which had been previously specified, and adding a tenth head, to the effect, that the said amendments had materially changed the very substance of the former bill, and were an attempt to make a new and different case (pp. 114-115.)

By the decree of the Circuit Court, entered the 22d of August, 1896 (pages 119, 120), the Court overruled the first three grounds of demurrer, but sustained the fourth, making its opinion a part of the decree (see pages 116 and 117) and dismissing all of the said bills, without considering the six remaining grounds of demurrer. In said opinion the learned Judge based his decision upon the illegality of the contract in withdrawing competition for the franchise from before the City Council of the city of Richmond (page 117).

On the appeal to the United States Circuit Court of Appeals, that Court affirmed the decree of the Circuit Court, but based its decision on the ground overruled by that Court, to-wit: that the petitioner's remedy, if any he had, was at Law, and not in Equity (page 141). Simonton, Cir. J., sitting in the United States Circuit Court of Appeals, concurred with the Circuit Court that the contract sued on was against public policy and void. Brawley, Dis. J., dissented, and seemed to think that the remedy of the petitioner is solely against Sheild (page 145). The Chief Justice gave no opinion on any point except as to the remedy, and both he and Simonton, Cir. J., concurred in holding that this, if existing, was at Law, and not in Equity. As this denied the equity jurisdiction, the Chief Justice might well refrain from investigating the question of public policy, and that he gave no opinion on it, is not to be taken as

an indication of his disagreement with Simonton, Cir. J., upon the question of public policy.

ARGUMENT.

At the threshold of the argument we wish to call the attention of the court to the fact, that this brief is not filed on behalf of P. B. Sheild, the party to the contract with the petitioner, of the 9th August, 1895, but on behalf of the parties who embarked in the enterprise therein described without a knowledge of the existence of the petitioner, much less of his contract with Sheild, until his card appeared in "The State," 26th August, 1895, and who, on investigation, were convinced that the petitioner had no ground for his claim. See card of John Skelton Williams, President of the Traction Company (page 94).

We propose to argue the following grounds of defence :

1. The right to use the statements of the original bill omitted in the last amended bill.
2. The contract sued on is against public policy, being for the withdrawal of competition for a public franchise and for the use of improper means in obtaining the said franchise, and does not fall within the class of contracts represented by *Brooks vs. Martin*, 2 Wall., 70.
3. The petitioner has a plain, adequate and complete remedy at Law, if any he has, and therefore Equity has no jurisdiction.
4. Plaintiff's conduct and the relief he seeks are inequitable, and the prayers of his bills cannot be granted.
5. The contract is one between promoters, which cannot be enforced against the defendants.
6. Quo warranto should have been resorted to in the attack upon the corporation.

Before entering upon the argument of the grounds most elaborately discussed by our learned opponents, it is deemed proper to call attention to

The Force of a Demurrer,

which seems to be so misconceived in their brief. The rule is stated as follows in *Dillon v. Barnard*, 21 Wal., 437: "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument when the instrument itself is set forth in the bill or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of purpose to the parties, when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer." See also *U. S. v. Ames*, 99 U. S., 45-6.

This definition of the scope of the admissions of a demurrer, excludes a good deal of the lengthy brief filed for the petitioner. We would next notice

The Right to use the Omitted Statements of the Original Bill.

The brief for the petitioner calls attention to the fact that Simonton, Cir. J., used some of these omitted statements in his opinion, but it fails to state that Brawley, Dis. J., in his dissenting opinion, so much relied on, also recites one of the most important of these statements as a fact to be considered upon the demurrer to the amended bill. This appears in Judge Brawley's statements in the following sentence (page 142), which was taken from the original bill, as they will be found to have been omitted from the last amended bill, the demurrer to which was under discussion:

"Stewart (the New York banker), fearing that the continued rivalry might result in the defeat of both, or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they

united in an agreement for mutual co-operation and for an equal division of whatever profits were realized."

This use of the original bill on a demurrer to an amended bill is justified by authority. It was said in *French v. Hay*, 22 Wal., 246, that "an amended bill is esteemed a part of the original and a continuation of the suit. But one record is made." This was also held in *Excelsior Peble Co. v. Brown*, Circuit Court of Appeals for 4th Circuit, 20 C. C. A. 428.

See also in confirmation—

1. *Daniel Ch. Pr.*, 402 (Ed. of 1871).

Munch v. Shabel, 37 Mich., 166.

Ogden v. Moore, 95 Mich., 290.

Carey v. Smith, 11 Ga., 539.

Crokey v. Plumpel, 37 Ill. App. 792.

The Last Amended Bill Should not Have Been Allowed to be Filed.

But the whole case was before the Circuit Court of Appeals and is now before this Court, and we insist that the 10th ground of demurrer to this last amended bill should be sustained. It is in these words (page 115): "* The second amended bill of the complainant Hyer materially changes the very substance of his original bill, and is an attempt to make a new case."

As the first amendments were only a few verbal ones, not objected to, the last bill filed is here treated as the *second amended bill* (see page 81, &c.).

In *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 52, besides inserting a new name, the complainants proposed to strike out the whole stating part of the bill (except the recital of the charter), the interrogation part and the prayer, and to insert as a substitute and by way of amendment, not a statement of a new matter entirely, but a restatement of the original matter in a different phraseology; leaving out some of the allegations or portions thereof; introducing some new and additional matter.

The Vice Chancellor said: "Under the privilege of

amending, the party is not to be permitted to make a new bill. Amendments can only be granted when the bill is found defective in proper parties in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case but not forming the substance itself."

This is also stated to be the rule by Chancellor Kent in *Lygon v. Tallmadge*, 1 John, Ch. (N. Y.), 184; and in *Shields v. Barrow*, 17 How., 144, the doctrine of these cases is approved. Curtis, J., said: "Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer."

Goodyear v. Bourn, 3 Blatch (U. S.), 266.

In *Metro. Nat. Bk. v. St. Louis Dispatch Co.*, 38 Fed. Rep., 57; where the original bill was to foreclose a mortgage on tangible property, and two amended bills alleged that the tangible property had been destroyed, and it was therefore held that the complainant could obtain no relief in that suit; it was held that leave to file a third amended bill alleging the existence of the tangible property, for the purpose of reaching the intangible property should be denied.

Mr. Justice Brewer said: "Where an amended bill is sought to be filed, which is based upon allegations contradicting those in the prior bill, those allegations being of substantial and basal facts, it seems to me that the court may properly refuse to allow it to be filed."

Motion to strike out was sustained.

The rule is well settled that matter which constitutes a new bill, or matter inconsistent with, or repugnant to, the substantial allegations of the original bill, cannot be introduced by amendment.

Ogden v. Moore, 95 Mich., 290.

1 *Danl. Ch. Pl. and Pr.*, 5th Ed., 402.

Cary v. Smith, 11 Ga., 539.

Hill v. Harrimann, 95 Tenn., 300.

The amendments allowed, by the permission of the Circuit Judge to file the amended and supplemental bill, April 6, 1896, do not come within the rule as laid down by this and other courts.

In the original bill (p. 5), the reason for withdrawing the competition between Sheild and Hyer for the franchise of a street railway on Broad street, and connecting streets in the city of Richmond, which competition had been distinctly stated at p. 3, was given in these words (p. 5), as the advice of the banker of the petitioner :

“The said Stewart then advised your orator, that rivalry between the Conduit Company and your orator and his associates on the one hand, and the Traction people and the said P. B. Sheild and his associates on the other hand, and antagonism of this character, would probably result in the defeat of both their schemes, or the passage of the franchise in favor of one of the two competitors, loaded with such onerous and exacting conditions that no capitalist could be induced to put money in the enterprise ; and he therefore urged your orator to shake hands with said Sheild, to unite forces with him upon one of the two ordinances—the Conduit ordinance or the Traction ordinance, and thus to secure and share the fruits of victory, instead of the disappointment and bitterness of defeat. Mr. Sheild and your orator, realizing the wisdom of this counsel, were then and there introduced by Mr. Stewart, and, after some conference, parted to meet later at your orator’s hotel, having arrived at a general agreement, that the promoters of the Conduit scheme, represented by your orator, and the promoters of the Traction scheme, represented by the said Sheild, co-operate and share equally in the profits of the enterprise.”

This plainly and clearly states the fact that it was to prevent the city of Richmond from taking advantage of the said competition.

The contract of August 9, 1895 (p. 6), binds the parties

and their associates, "mutually to co-operate one with the other in securing a franchise for said Railway," on "the application and franchise to be presented by the Richmond Traction Company," and that they were to decide between themselves "the policy we (they) will use in procuring the same." The petitioner, Hyer (at p. 8), states what he did in compliance with this part of the agreement. He says that he endorsed on a copy of the proposed ordinance, "a request or direction to his friends in Richmond, to give it their hearty support," and that one of these whose name he suggested to be inserted in the ordinance, "was at the time in Richmond, and was up to that moment, at work upon his Conduit scheme, but who, with your orator's entire working force, went over at once to the Traction side, openly and heartily, though some of them even then thought, as all now see, that this change of front was a mistake." And on p. 9, it is stated that the petitioner's friends and associates in Richmond, "continued in good faith to work with the Traction people, and for the passage of their ordinance, some of them actually up to the very day the Board of Aldermen finally concurred in the ordinance as passed by the lower house." This working force is described in the original bill as very effective. At p. 7, it is said they, "had the Street Committee, they had the ear of the Council." At p. 4, in describing the condition of affairs as between him and Sheild, when the petitioner went to New York to perfect his arrangements with Stewart the banker, he says he "regarded himself and associates of the Richmond Conduit R. W. Company, as having altogether the inside track in the premises," and that they "appeared to be, indeed were, masters of the situation." These expressions plainly mean that the working force of the petitioner had acquired such personal influence over the members of the City Council as to have that Council under their control, and so thoroughly under their control, as to be able to get the Council to pass the Traction ordinance instead of the Conduit ordinance, which they had first gotten them to approve, and that such influence was exerted to that end. Such personal influence exerted over

members of the Council, is unlawful, as will be demonstrated by authorities hereafter to be cited. The original bill therefore sets forth a withdrawal of competition for this street railway franchise, made expressly to prevent the city of Richmond from taking advantage of that competition to demand terms deemed advantageous to itself, and the use of a lobbying force to obtain the passage of the sole ordinance agreed upon, to be offered to the city. The petitioner therefore, in his original bill, relied on a corrupt contract to withdraw competition for a public franchise, and on the use of corrupt methods for obtaining the passage of the ordinance, which methods he asserts, were a fulfilment of the contract under which he claims.

The omission of these statements in the amended bill, was an effort to so change the grounds on which the petitioner relied for relief, as to make a new case. The attempted change was intended to be as radical as that produced in the healing of a leper. The amendments eliminated all statements of competition and rivalry; all reference to the grounds on which the parties determined to withdraw competition, and "share the fruits of victory," and all allegations touching a working force operating on the City Council. So that instead of the immoral agreement, and immoral method of executing it, set forth in the original bill, as grounds for recovery, the petitioner undertook to make a new case, entirely unlike, and contradictory of that set forth in his original bill, and to substitute a clean contract in the stead of a foul one. The excuse for seeking these amendments is found at p. 73, in the petition to amend, and at p. 89 in the amended bill. It is in these words:

"And your orator here takes occasion to state that he applied for and obtained leave of court, to amend this, his original bill, by emphasizing the openness, publicity, and fairness with which said contract was carried into effect before the City Council and its Committees; not because he considered his said bill fairly construed, as being defective in this regard

—but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences, and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895.”

This is a lame excuse, and one we would be tempted to pronounce insincere, were it not that the enthusiasm of the learned counsel for the petitioner is such that they are ready to believe anything to be true which seems to be to the advantage of their client. Certain it is that the excuse is not equal to the occasion. If the object of the learned counsel was simply to “emphasize the openness, publicity and fairness with which the said contract was carried into effect before the City Council and its committees,” as is alleged, and no other object is alleged, why were the statements as to the previous rivalry between the parties and the reasons which influenced them to enter into the contract, omitted? And if it be true that learned counsel did not consider the original bill “fairly construed, as being defective in this regard,” as is also stated, what was the need of amendments in regard to the conduct of the petitioner in carrying the contract into effect? Could not the counsel trust the learned Judiciary to make a fair construction of his original bill? But it is added that the original bill “contained some loose and careless expressions, which might be attempted to be twisted into an admission that something other than proper and legal influences, and the utmost candor and publicity was intended or practiced in making and carrying out of the said contract of August 9, 1895.” Now no one of the statements of the original bill, omitted in the amended bill, can properly be characterised as *loose* or *careless*. They are, indeed, careful and distinct statements of *loose* morality in making and carrying out the said contract. But we may well challenge the learned counsel to point out *looseness* or *carelessness* in the language. Certainly the ground urged by Stewart, on which the competition was withdrawn, and the use of the

petitioner's *working force*, which had the ear of the Council, in obtaining the passage of the Traction ordinance, are stated with remarkable clearness, so that no two meanings could be attached to them. Nor was there any carelessness in framing the original bill. The learned counsel were employed by Hyer as early as 3d September, 1895 (see page 14), and did not file the bill till October 30, 1895. The bill was twice amended, once in a few words, and again by supplement, without any discovery by learned counsel of any looseness or carelessness in the language under discussion, and it was only afterwards, on the 6th April, 1896, after the demurrer had been developed by assigning the causes, that such was claimed to exist. Three times before the language had been relied on as perfectly proper and distinct. The attention of the Court is also called to the fact that neither in the petition to amend (page 66, &c.) nor in any of the pleadings, is it pretended that the statements stricken out by amendment from the original bill were found to be *untrue* or *mistakes of fact*. These troublesome statements are therefore admitted to be true, and because true they are troublesome since their bearing has been discovered.

Presumption of Legality.

The learned counsel might have saved themselves the labor of proving by many cases that the presumption of law is in favor of the legality of contracts. This canon of construction is familiar to every tyro in the profession. But another rule of law cannot be disputed successfully, even by indirection, as seems to be attempted, and that is, that if it clearly appears that the contract sought to be enforced is illegal, "either because its consideration is fraudulent, against morality, or against the principles of sound policy, or in contravention of the provisions of some statute" (Beach on Contracts, §1415, *Gibbs v. Baltimore Gas Co.*, 130 U. S., 396, Ch. Justice Shaw in *Fuller v. Dame*, 18 Pick. (Mass.) 472), the presumption of legality is overcome, and the contract cannot be enforced by the courts. In other words, if the contract falls within the prohibited class, no presumption as to its validity

exists. *And again*, in construing contracts, the intention of the parties should be sought, and this may be searched for, not only in the language of the contract, but in that language interpreted in the light of the surrounding circumstances. As has been well expressed in *Guaranty, &c., Association v. Raton*, 6 Ind. App., 83, 87, the Court should consider "the situation and relation of the contracting parties, the objects to be accomplished, and the motives they had in dealing with each other." See also *Houlton v. Nichol*, 33 L. R. A., 166, cited on pages 52 and 53 of petitioner's brief.

It is contended for the demurrants that the contract sued on is plainly

Against Public Policy.

And this on two grounds, its stipulation to withdraw competition already existing for the grant of a franchise in which the public were interested, and the unlawful manner in which the parties were to obtain and enjoy said franchise. And first the

Withdrawal of Competition.

Greenhood, in his work on Public Policy, page 178, Rule clxxii, correctly states the rule thus :

"Any agreement which in its object or nature is calculated to diminish competition for the obtainment of a public, or quasi public contract, to the detriment of the public, or those awarding the contract, is void." And he cites many cases in support of the text. This statement of the law has been plainly approved by this court in the case of *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, in which the Chief Justice, in delivering the opinion of the court, said :

"In the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint however partial, because in contravention of public policy."

"All (promises) detrimental to the public order and public good, in such manner and degree as the courts have defined ;

* * are void" (pp. 409-10). Among the cases cited by the Chief Justice in support of this statement, is *Woodruff vs. Berry*, 40 Ark. 251. In that case, at p. 261, the court said: "When either the intention, the effect or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy and will be disapproved."

In other States the same doctrine has prevailed, and has been, if any thing, more plainly stated.

In *Gibbs vs. Smith*, 115 Mass. 292, where it was sought to enforce a contract for \$500 for not bidding for the labor of the inmates of a house of correction, the court held the contract void, and said: "Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose which they must have contemplated when it was made; its validity is tested, not by its results, but by its objects as shown by its terms." The same language is used in *Rice vs. Wood*, 113 Mass. 133. And in *Atchison vs. Mallon*, 43 N. Y. 147, where there was competition for the collection of town taxes, and the plaintiff and defendants agreed to bid severally, and to divide equally the profits if either obtained the contract, the agreement was held void as against public policy, and the court said: "The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interest? The rule is that agreements which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principles of sound public policy and are void."

And in *Central Ohio Salt Co. v. Guthrie*, 35 Ohio State, 666, the Court said:

"Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *Firemen's, Etc., Associa. v. Berghaus*, 13 La. Ann., 209,

the principle is stated to be, that "when a contract belongs to a class which is reprobated by public policy, it will be declared void, although in that particular instance no injury to the public may have resulted." Approved in *Texas & Pacific Ry. Co.*, v. *S. P. Ry. Co.*, 41 La. Ann., 970.

The same principle is maintained in *People v. Sheldon*, 139 N. Y., 251. Andrews, C. J., said :

"If agreements and combinations to prevent competition in price, are or *may* be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case, to establish the invalidity, although the moral evidence might be very convincing."

So in *Hannah v. Fife*, 27 Mich., 180, it was said : "It is this tendency, rather than the fact of actual fraud in the particular transaction, which is generally recognized as rendering contracts void as against public policy." And in conclusion the Court said : "The thirst for public plunder, always strong, has of late been stimulated to unwonted eagerness, and has seized like an epidemic upon all classes of the community. If public officers and the courts can not check its progress by any obstacle of their own creation, they can, at least, refuse to aid in spreading the contagion, and may do something to discourage and check its course, by refusing to afford it such facilities as it may be within their power to withhold."

And in *Swan v. Chorpenning*, 20 Cal., 182, where there was an agreement respecting a government contract, in delivering the opinion of the Court, Cope J., Field, C. J., concurring, said :

"It is contended, that the particular circumstances of this case relieve the transaction of its illegal character; but we take a different view of these circumstances. The purpose for which the bid was to be withdrawn, we do not consider material, nor do we regard as important the fact that the withdrawal resulted in no actual injury to the Government: * * * The

agreement to withdraw was undoubtedly injurious in its tendency, and the policy contravened by it is only to be satisfied by declaring its invalidity."

In *Smith v. Applegate*, 3 Zab. (N. J.), 352, Green, C. J., said :

"It may be that the transaction, as between the parties, was fair, and that no fraud was meditated or actually committed. It may be that the makers of the note have received a full equivalent for the price which they assumed to pay. It may be that the owner of the land would receive, by the payment of the note, no more than a fair equivalent for the land taken for the road. But courts cannot lend their aid nor the sanction of the law, to enforce a contract in contravention of sound policy, and subversive of the interests of the public."

In *Wicker v. Hoppock*, 6 Wal., U. S. 98, cited in the brief of the appellant, the contract was for bidding at a judicial sale, and as was said by Mr. Justice Swayne in delivering the opinion, the contract was that one party *should bid*. There was no stipulation that the other should not, nor was there anything which forbade him to bid, and nothing which had any tendency to prevent bidding by others. The object of the contract obviously was to secure, not to prevent bidding.

In delivering the opinion of the court the Justice said :

"*The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished.* If the object be fair—if there is no indirection—no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained."

It will be seen that the actual effect upon the public interest in any case of a withdrawal of competition is not the controlling fact in the condemnation of the contract to withdraw, but the natural tendency of such an agreement to injuriously affect the public interests is the matter to be considered.

In the case at bar, not only does the contract sued on have the natural tendency to injuriously affect the public interest, but the parties openly avowed such to be their intention, and further, the actual result of their agreement was to injuriously affect the public interests. That there was competition between the parties for the franchise in question is plainly stated in the record, even in the last amended bill. At page 84 the petitioner states the history of his application for the said franchise on behalf of himself and his associates under the corporate name of the "Richmond Conduit Company." On page 85 he states that "certain parties were seeking to procure the grant of this franchise to them under the style of the 'Richmond Traction Company,'" and "that one P. B. Sheild, an attorney at law, appeared to be at the head of the movement, or at least in charge of it before the City Council and its committees."

The petitioner then goes on to state (pages 85-6) how he was introduced to Sheild at the office of Stewart & Co., in New York, at the earnest solicitation of Sheild, and how they agreed to end their competition by the withdrawal of the application for the Conduit ordinance from before the Richmond City Council, uniting on the Traction ordinance, and sharing equally whatever might be realized from the enterprise. The matter is plainly stated also in the card of the petitioner in the *State* newspaper, 26th August, 1895, which appeared in the shape of an interview. In this (page 93) he states he held the contract in question, and in answer to the question, "*What is the consideration of this contract you hold?*" he replies: "I WAS TO CAUSE THE WITHDRAWAL OF THE RICHMOND CONDUIT COMPANY'S APPLICATION FOR FRANCHISE IN FAVOR OF THE TRACTION COMPANY, *which was done in due form before the Street Committee*. There were a few other minor details, all of which have been complied with." The contract itself also shows a withdrawal of competition between the parties and their uniting on one of the ordinances theretofore proposed. Now as a competition for this valuable franchise already existed, in rival proposals for it by different parties, thus giving the city the opportunity

of getting the best terms for its grant, the withdrawal of that competition left the city with but one bidder, and therefore deprived her of the vantage ground of putting up the franchise to the highest of two bidders. That the exercise of the franchise would be beneficial to the city is apparent, but she was entitled to get the best price for it from those who wished to acquire it. It cannot be denied, therefore, that the natural tendency of the withdrawal of competition between the parties seeking the franchise, was to injuriously affect the public interest. And if so, under the authorities cited, the contract was against public policy and void.

But other elements make this a still stronger case against the parties. It was their proposed intention to benefit themselves at the expense of the city. In the last amended bill, at p. 86, an account is given of how the parties came to withdraw their competition, and unite on one of the ordinances proposed. It is said that the banker "Stewart then advised your orator to shake hands with Sheild, and to unite with him upon one of the two ordinances—the Conduit or the Traction ordinance. Mr. Sheild and your orator realizing the wisdom of this counsel, were then and there introduced" and made this contract. Although the attempt is here made to smother the grounds of Stewart's advice, it is plain that the withdrawal of competition and union on one of the proposed schemes was intended for the benefit of Hyer and Sheild and their associates, for the parties realized "the wisdom of the counsel," of course its wisdom in reference to themselves, or the advantage it would bring to them in dealing with the city. In the original bill the grounds of Stewart's advice, as stated by himself, are given (p. 5) and have been quoted. It is said that upon this wise advice the contract was made. Here it is plainly stated that the rivalry and competition were so warm, that they might result in the parties accepting such hard terms from the city as to defeat the enterprise in the hands of the winner; and by withdrawing competition and uniting they would secure the *fruits of victory* over the city. It was, there-

fore, with the intention to benefit themselves at the cost of the city, that the competition was withdrawn and the union of the parties on the Traction ordinance was agreed on.

That this action of the parties was actually injurious to the interests of the city of Richmond is also shown in both bills. The word *conduit* in the name of the petitioner's ordinance indicates that the motive power proposed to be used was *electric*, but the wires were to be *under ground*. Booth on Street Railways, § 66, defines the conduit system as an "electric propulsion underground." And he defines the cable system as purely "mechanical," and not included in the "electric class." We see by the contract sued on that the application to be presented to the City Council was to be that of the Traction Company "for the building of an overhead trolley railway or cable system." This means either that the ordinance was to be for an overhead trolley railway or for a cable system, one or the other only asked for, or that it was to give the city the choice between an overhead trolley and a cable system. Under either interpretation the proposal of the Richmond Traction was for a very different system from that which was proposed by the Conduit Company. That an underground electric propulsion was safer for the public than an overhead trolley system is self-evident; and that a well perfected conduit system, as has now been attained, is preferable to a mechanical cable system, is also apparent from the preference given to electricity as a motive power in the construction of street railways. The City Council had indicated a preference for the *conduit* system by passing the ordinance for it, which only waited for the amendments desired by the petitioner. When the petitioner withdrew his application for a conduit franchise, he deprived the city of those very advantages of which he had convinced the City Council, as his only competitor proposed a different system which he had shown to be inferior.

But it is insisted that the city could not have been injured by this, because it is alleged that, by the 5th paragraph of the Traction ordinance (p. 21), the city reserved absolute choice

and control of the motive power to be used by that company. That paragraph is in these words:

Fifth. "The said company may operate its cars along said routes by electricity or such other motive power, except steam, as may be hereafter *authorized* by the City Council, but such permission to use electricity shall be subject to each and every restriction and condition heretofore imposed by the City Council upon any one or more of the street railway companies using electricity as a motive power in this city, except as herein otherwise provided; and for the failure of the said company to perform any one or more of said restrictions or conditions, it shall be liable to a fine of not less than ten nor more than one hundred dollars, each day's failure to be a separate offence. The city hereby expressly reserves the right to revoke at any time the right or permission to use electricity as a motive power, or to put any further conditions, restrictions and regulations as to the use of electricity."

In interpreting this paragraph, it is necessary to consider the circumstances attending the passage of the ordinance. (*Nash v. Towne*, 5 Wal., 699.) In the last amended bill (p. 90), it is stated that, "The existence and substance of the contract of August 9, being generally and fully known by the Council of Richmond, and the public generally, and in no way concealed or suppressed." (The word "city," is improperly printed before the word "August.") By that contract, the Traction Company was to use the overhead trolley system, if allowed to use electricity. This being known to the Council, when they by the ordinance, permitted the Company to use electricity, and forbade the use of any other motive power, without a subsequent special authority from the Council, it must have been understood, that the trolley system was to be used. Again, when this permission was put under the restrictions and conditions theretofore imposed upon the other city railway companies of the city using electricity as a motive power, it indicated that those companies used electricity by the

same system, and this explains paragraph 7 (p. 21), whereby it is provided that there may be an interchange of tracks between the Traction Company and other companies using electricity. When therefore, it is further provided in paragraph 5, that the city may "put further conditions, restrictions, and regulations as to the use of electricity," the reference is to the use already granted, which was that of the "overhead trolley system." That is the subject matter of the paragraph, and its language must be interpreted with that fact in mind, and so as to make the language refer to the use of electricity intended to be granted. It is the use of the trolley system previously granted, that is made liable to further conditions, restrictions, and regulations.

If however, the language can properly be interpreted to mean that the city reserved the right to require the use of the Conduit system by the Traction Company, then attention is called to the fact that no penalty is attached to their refusal to obey, and they might therefore prefer to give up their franchise, rather than change their system. And the same may be said of the power reserved to revoke the right to use electricity as a motive power. So that the city would have no right to *force* the company to use any other than the overhead trolley system, although it might require it. And, therefore, the statement in the brief (p. 75), that "the Council reserved absolute choice and control as to the motive power and character of the road," is incorrect. Under the ordinance, the city could not force the Traction Company to change its system, and therefore does not control the company in any sense that prevents the withdrawal of the previous competition from affecting it injuriously.

But the withdrawal of competition injured the city in other matters of interest to her. By the Act of March 20, 1860, authorising the city to pass the ordinance (see appendix to this brief), the Council was authorised to impose "such provisions, restrictions, and limitations," as it deemed best. In exercising this power, the city was entitled to the best terms it could get, as the result of the competition. In paragraphs 9

and 10 (pp. 23-24) we find that the city requires of the company a percentage on gross receipts 'till 1900, and a sum to be fixed afterwards, that the rate of fares to the public, to school children, and to laborers, is fixed; and other regulations will be found in the ordinance in the interest of the city. All these had to be fixed with a sole applicant for the franchise. Had the competition continued, the city would have been able to get better terms for herself and her citizens in each of these items. Or, she might have sold the franchise for a large sum in gross. The withdrawal of competition was therefore directly injurious to the interests of the city, and was so intended to be by the parties, who had become aware of the fact that the city intended to use that competition to her own advantage, and for that reason withdrew their competition.

It is attempted to make the impression that the withdrawal of competition and combination of the parties was to unite the services of an engineer (Hyer), of a lawyer (Sheild), and of a banker (Stewart) in the enterprise. The answer to this is that no such motive is assigned in any of the bills. On the contrary, the petitioner represents himself as unwilling to treat with Sheild until Stewart pointed out the injury Sheild might do him by the competition.

It was also argued for the appellant heretofore, and may be again, that the agreement sued on was only an arrangement whereby parties desiring to undertake an important enterprise, and having difficulty in obtaining capital, united, and were thus enabled to undertake an enterprise which otherwise would have been abandoned, to the detriment of the city. The allegations of all the bills, however, negative this position. It is alleged (pages 2, 4, 84-5) that the appellant had obtained co-operation or assurance of adequate capital before he made his first application for the franchise; that on 9th of August, 1895, he was in New York perfecting his arrangements for prompt and vigorous action under his Conduit ordinance, and that his conference with Sheild was only at the earnest pleading of Sheild (pages 85-6), and that his contract with him was a mistake (p. 8); so that the appellant shows that he and

his associates were amply able to carry out their scheme without aid from Sheild and his associates. That Sheild needed no aid from the petitioner or his banker in obtaining capital is also shown in the last amended bill, at page 102, where it is stated that the Maryland Trust Company and John L. Williams & Sons negotiated the bonds of the Company used in constructing its works.

Nor does the alleged open avowal of the contract before the Council cleanse it of its immorality. Had nothing been said by the parties as to their agreement, the fact that the Conduit ordinance was withdrawn, that one at least of the persons who had asked for it appeared in the Traction ordinance—W. F. Jenkins (pages 96-7)—and that the persons who had urged the Conduit were now urging the Traction ordinance, would have informed the Council that the parties had agreed among themselves to withdraw competition and share in the remaining ordinance. It is not possible to conceive that, where two or more persons first compete for anything, and the competition is afterwards withdrawn, the person or corporation having the disposal of the thing competed for, does not become aware of the withdrawal. And when the competitors at once become allies in the effort to obtain for themselves jointly what they previously competed for separately, they thereby give conclusive evidence of a bargain to share in the thing sought. What more could an open avowal of the contract do to inform everyone interested of what had happened? We may well inquire also how it was possible that the City Council could be in a better condition to take care of its interests after the alleged avowal, than it would have been had the Conduit ordinance been withdrawn and the Traction substituted, without a word of explanation. It has been held that the concealment by a lobbyist of the interest he represents is a fraud on the legislature, but no authority makes the concealment, even in such case, a necessary element of the illegal conduct. Even in the case of lobbying, when open avowal would put the Legislators more on their guard, this Court has regarded publicity of action as but an aggravation of the immorality. In *Trist vs. Child*, at page

451, in denouncing contracts for lobby services before Congress, the Court said :

“ If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of public morals and the degeneracy of the times. No prophet’s spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same.”

In the great case of *Edgerton vs. Brownlow*, 4 H. L. Cases, 1 to 225, and in *Kingston vs. Pierpont*, 1 Simon, 5, therein commented on, the cases involved the construction of wills that had been recorded, wherein sums were left to employ agents to obtain peerages for devisées. Here everything, including the work of the agents, was open, and yet the House of Lords condemned the provisions as corrupting in their tendency, denouncing them because of their openness, as unblushing and audacious ; and so here, the openness of the contract sued on only demonstrates the shamelessness of the parties, without in the least purging their immorality.

In addition to the authorities already cited, the following may be added, as cases in which the contracts were condemned :

Galick v. Ward, 5 Halstead (N. J.), 87, which was a contract to abstain from bidding for a mail contract.

Ray v. Mackin, 100 Ill., 246, where B having bid for paving a street, C proposed to bid against him, and B then agreed to withdraw his bid and permit C to file a bid, which B was to aid in getting accepted, and to receive a certain sum out of the profits.

Pingrey v. Washburn, 1 Aiken (Vt.), 264, where it was sought to enforce an agreement on the part of a corporation, to grant to individuals certain privileges, in consideration they would withdraw their opposition to the passage of a legislative Act touching the interest of the corporation.

Hunter v. Nolf, 71 Pa. St., 282, in which there was an

agreement for the withdrawal from competition for an assessor's office.

Gray v. Hook, 4 N. Y., 449, also a case of withdrawal of competition for office.

Kine v. Turner, 27 Oregon, 356, in which the agreement provided for not bidding at a sale of public land.

Chippewa Valley etc., R. Co. v. R. R. Co., 75 Wis., 224, where there was an agreement for not bidding for land grant, and promise of aid to another to secure it.

Atlas Nat. Bk. v. Holm, 71 Fed. Rep., 489 (C. C. A., 7th Cir.), which holds that a note given in part in consideration of an agreement to refrain from bidding at a public sale of goods by a statutory assignee, was invalid, except in the hands of an innocent purchaser.

Sharp v. Wright, 35 Barb, 236, an agreement between different sets of bidders for a public contract, by which one agreed, in consideration of a sum of money, to withdraw his bid, and assist the latter to obtain the contract. Held to be void as against public policy.

In *Cocks v. Izard*, 7 Wal., 559, preventing competition at a judicial sale was declared illegal, and the court declared that "the law will not tolerate any influences likely to prevent competition at a judicial sale."

See also :

Gibbs v. Consol. Gas Co., 130 U. S.

Woodruff v. Berry, 40 Ark., 251.

National Bank of Metropolis v. Sprague, 20 N. J. Eq., 159.

Doolin v. Ward, 6 Johns (N. Y.), 194.

Wilbur v. Howe, 8 Johns (N. Y.), 346.

Stanton v. Allen, 5 Denio (N. Y.), 434.

The cases cited by the learned counsel for complainant, in support of their contention that the contract here sued upon is not void as tending to withdraw competition, are simply cases where the sale of the property or the letting of the contract was benefitted by the joint action of parties interested, as where the property could not be properly divided or separated so as

to bring the sale within the means of individual bidders, or where the combination or association of the parties was to enable them to become bidders and not to prevent competition. The distinction is well defined by the courts between that class of contracts and such contracts as the one at bar having as its very foundation and chief motive and its plain tendency, the suppression of rivalry and competition between the parties previously bidders for a public franchise. *Men may lawfully combine to purchase what individually they cannot or would not buy, or to acquire and exercise a public franchise under similar circumstances. Such combinations everywhere appear in the conduct of public improvements. But where two or more persons or sets of persons ONCE COMPETE for a public franchise, and AFTERWARDS WITHDRAW competition in order to obtain the franchise on better terms for themselves, IT IS ILLEGAL. This distinction runs through the following cases, cited for the petitioner :*

The case of *Kearney v. Taylor*, 15 How., 514, quoted at length in the brief for the appellant, was a suit to set aside a deed to property which had been purchased by an association created for the purpose, and one of the grounds alleged for the equitable interference was that such an association was illegal. The facts of the case, as they appear in the opinion of Nelson, J., were that a large tract of land was offered for sale, and presented a favorable opportunity for the building of a town. "This enterprise, however, required a considerable outlay of capital, in the construction of docks or wharves and in the erection of a warehouse and other edifices for the accommodation of the public, beyond the means of any individual in that retired locality, or of any one who might be inclined to take an interest in it. To overcome this difficulty, those interested in the sale and who were desirous the property should bring the highest price, exerted themselves to form an association or company, composed of persons in the neighborhood who had a common and general interest in the object in view, the building up of this little port and town, for the purpose of bidding in the property and engaging in the enterprise. * There was also another circumstance that operated in the formation of

this company. A little port and town had sprung up at a neighboring point on the bay, called Middleton Point, and it was given out that the people of this town had associated to bid off the site of this new one at the sale, in contemplation and with a view to prevent a rival place of business in the vicinity. Under these circumstances, the company in question was formed, and bid at the sale in competition with the Middleton Point association; and being the highest bidders, the property was struck off to them."

Phippen v. Stickney, 3 Metcalf (Mass.), 64, also clearly recognizes this distinction, and is not in conflict with the decision of *Gibbs v. Smith*, 115 Mass., 592, and of *Rice v. Wood*, 113 Mass., 133, to which we have called attention.

So with *Oakes v. C. W. Co.*, 143 N. Y. 430.

O'Brien, J., in delivering the opinion of the court, expressly said: "There was no purpose to suppress competition or bidding at any public sale, or letting of a contract for public purposes or in restraint of trade, or to influence the action of public officials." The whole court, however, did not think the contract in fact one for honest co-operation, for Gray and Finch dissented from opinion of the court.

The opinion of Gilchrist, J., in *Bellows v. Russell*, 20 N. H. 427, is in accord with our view of the law. He cites with approval *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Wilbur v. Howe*, 8 Johns. (N. Y.) 444, and the doctrine laid down by Mr. Justice Story, "that agreements whereby parties engage not to bid against each other at a public auction, especially where such auctions are directed or required by law, as in sales of chattels or other property by execution, are held void: for they are unconscientious and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction and mislead public confidence." Following this citation, the learned judge continues: "It is, therefore, a well settled doctrine, and is undoubtedly a reasonable one, that holds to be illegal and fraudulent a combination of parties for the express purpose of preventing competition among bidders at an auction, with a view to take advantage of such a state of

things for their own benefit. It is, however, a different thing entirely to hold that when several parties desire, for any reasonable and just purpose, to become the joint purchasers of property exposed at auction, or to become interested together in a contract so exposed for the competition of bidders, they may not lawfully employ one of their number to act in behalf of the whole, and to bid off for their benefit the property, job or contract so offered." In this case the question of the legality of the contract was submitted to the court. It was decided that "the intent, and other circumstances attending the consent of the parties to the arrangement disclosed in this case, must settle its legal character."

Marsh v. Russell, 66 N. Y. 288, was a case of partnership for the conduct of a lawful business, and the agreement was not an attempt to prevent competition.

In *Jenkins v. Frink*, 30 Cal., 586, the contract sought to be enforced, expressly stated the honest purpose of the parties, each being desirous of purchasing a part of the property offered for sale, and not the entire tract. The Court said: "there is no principle of right-reason upon which it can be held that the agreement now in question, was calculated to keep bidders away from the auction, or to prevent free and intelligent competition among those who attended it: while it is apparent, on the other hand, that one bidder at least, attended the sale in consequence of the agreement, and who for aught we know to the contrary, would have staid away if the agreement had not been made."

The case of *Lorillard v. Clyde*, 86 N. Y. 384, so confidently cited for the appellant, was one of the union of certain steam-boat owners to obtain a charter for their incorporation. They agreed on the details of the business of the proposed corporation, and the question discussed in the case was whether such previous agreement as to details was binding. There was no competition between the parties for the franchise in that case.

Lobbying.

By a strange lapse of memory, the learned counsel for the appellant, state that the foregoing class of cases on withdrawal of competition, was the only one to which any earnest effort was made by the defendants in the lower courts to assimilate the case at bar. They must have lost our printed briefs, as well as forgotten the oral arguments. We have contended in the lower courts, as we do here, that this case comes under the principle stated on abundant authority, by *Greenhood*, on Public Policy, Rule C. C. C., p 362, as follows: "*Any promise to pay a fee contingent, on the passage of a bill, is void, because a contingent fee is a direct and strong incentive to the exertion of not merely personal but sinister influences upon the Legislature, and therefore, public policy forbids the legal recognition of any such contracts.*"

Let us first examine the authorities, and then see if the allegations of the bills bring this case under the ban of the rule.

In the leading case of *Marshall v. B. & O. R. R.*, 16 How., 325-335, arising on a contract for contingent fee for lobbying, the doctrine is stated thus by the court: "Bribes in the shape of high contingent compensation, must necessarily lead to the use of improper means, and the exercise of undue influence." And the court declare "that all contracts for contingent compensation for obtaining legislation, or to use personal, or any secret or sinister influences on legislators, are void, by the policy of the law." And "that what in the technical vocabulary of politicians is termed *log rolling*, is a misdemeanor at common law, punishable by indictment." Log rolling is defined by Worcester to be "a cant term for a system of manœuvring or mutual co-operation in legislation, &c., to carry favorite measures." This statement of the law is sustained in subsequent cases in the Supreme Court.

Tool Co. v. Norris, 2 Wal., 45.

Trist v. Child, 21 Wal., 441.

Mcquire v. Corwin, 101 U. S., 108.

Oscanyan v. Arms Co., 103 U. S., 261, 269, &c.

Woodstock Iron Co. v. R. & D. Extension Co., 129 U. S., 643, 662.

McMullan v. Hoffman, 69 Fed. Rep., 509.

And is recognized in the late case of *Gibbs v. Baltimore Gas Co.*, 130 U. S., 396.

In *Tool Co. v. Norris*, the Court through Justice Field, said (pp. 54 and 56) :

"The principle which determines the invalidity of the agreement in question, has been asserted * * in cases relating to agreements for compensation for obtaining legislation. These have been uniformly declared invalid, and the decisions have *not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements*. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it.

* * Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. * * All agreements for pecuniary consideration to control the business operations of the Government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the Courts of the country."

In *Trist v. Child*, which arose on the claim of an attorney for a contingent fee for legitimate or purely professional services in representing a claim before Congress, but, who it appeared, blended with such services, personal solicitation of the members, the Court after drawing the line between the two, said (p. 452) :

percentage upon the amount appropriated, the danger of tampering in its worse form is greatly increased. It is by reason of these things, that the law is as it is upon the subject. It will not allow either party to be led into temptation when the thing to be guarded against, is so deleterious to private morals, and so injurious to public welfare. In expressing these views, we follow the lead of reason and authority."

These decisions of the Supreme Court of the United States, which are controlling in this case, have been followed in many decisions of the highest State Courts, among which may be mentioned :

Clippenger v. Hepbaugh, 5 Watts & S. (Pa.), 315.

Mills v. Mills, 40 N. Y., 543, 546.

Rose v. Traar, 21 Barb. (N. Y.), 361.

Harris v. Roof, 10 Barb. (N. Y.), 489.

Powers v. Skinner, 34 Vt., 274, 281.

Pingrey v. Washburn, 1 Aiken (Vt.), 264.

Bryan v. Reynolds, 5 Wis., 200.

Chippewa Valley R. Co. &c. v. Chicago R. Co., 75 Wis., 224, 6 L. R. A., 601.

Hunter v. Nolf, 71 Pa. St., 282.

Elkhart Co. Lodge v. Cragg, 98 Ind., 238.

Sweeney v. McLeod, 15 Oreg., 330.

Doane v. Chicago City Ry., 160 Ill., 22.

Bermudez &c. Co. v. Critchfield, 62 Ill. App., 221.

Ormerod v. Dearman, 100 Pa. St., 561.

Spalding v. Ewing (1896), 149 Pa. St., 379.

Houlton v. Dunn, 60 Minn., 26.

Jacobs v. Tobiasson, 65 Iowa, 245.

Wood v. McCann, 6 Dana (Ky.), 366.

Smith v. Applegate, 3 Zab. (N. J.), 352.

Powell v. McGuire, 43 Cal. 11.

Clippenger v. Hepbaugh, 5 W. & S. (Pa.) 315.

Harris v. Roof, 10 Barb. (N. Y.) 489.

Rose v. Truax, 21 Barb. (N. Y.) 361.

The case of *Clippenger v. Hepbaugh* was also cited with approval in *Marshall v. Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

In that case a lawyer was to be paid \$100, contingent on procuring a law to sell and invest the proceeds of certain real estate devised to a wife and children. It was proved that he was employed professionally; that he simply drew papers and appeared before committee of the Legislature. The court said, at p. 319, "no suspicion is entertained that anything out of the ordinary course took place in respect to the bill, yet it cannot escape observation that even here an inducement was not wanting to an improper or personal influence or deceptive acts to procure the success of the measure."

And although the fee was small, yet, because it was contingent, the court held that the tendency of the contract was against public policy, and therefore void.

To the same effect are the other two State cases cited by the Supreme Court.

In *Powers v. Skinner*, 34 Vt. 274, where it was sought to enforce a contract for compensation in obtaining from the Legislature a bank charter, after reviewing the authorities, Kellog, J., for the court, said (p. 281): "The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done or was expected to be done under it. The law will not concede to any man, however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men."

In the case of *Chippewa Valley R. Co. v. The Chicago, etc., R. Co.*, 75 Wis. 224, 6 L. R. A. 601, the circumstances were remarkably like those in the case at bar. A contract was made by two railroad companies whereby one agreed to refrain from

any effort to obtain a grant of land from the Legislature and to aid the other company to procure it "by all reasonable and proper assistance," in consideration of a share of the grant obtained. The contract was declared to be void as against public policy. Cassoday, J., delivered the opinion of the court in an able and exhaustive review of the authorities on the subject, to which this court is respectfully referred, and which saves us from further wearying it with extracts from the cases cited by us.

The principle established by the numerous cases cited, and which might be cited, is embodied in the Code of Virginia 1887, sec. 3746, in force at the date of the contract sued on here, which was to be executed in the State of Virginia, as follows: "If any person pay or receive money or other compensations, directly or indirectly, for the purpose of securing the passage or defeat of any measure by the General Assembly, he shall be confined in jail not exceeding twelve months, and fined not exceeding five thousand dollars."

Sec. 3748 of the Virginia Code 1887 excepts persons who may be invited by, or have the permission of, regular or special committees of the General Assembly to appear before them. To claim the protection of this exception the complainant should have stated the fact of such invitation or permission, and that an appearance before a committee was the only service rendered, and in other features bring himself clear of the condemnation pronounced by the courts. For if to legitimate service he united illegitimate, or he had a contract which might tend to illegitimate service, this would destroy his right to recover for legitimate services, as was distinctly held in the case of *Trist vs. Child* and *Rose v. Truar*, *supra*, and other cases cited. Story Eq. Pl., § 255-7. *Crocket v. Lee*, 7 Wheat, 522.

We need hardly cite authority for the proposition that a contract to be performed in Virginia contrary to the policy of the Virginia statute, cannot be enforced in this State.

Two grounds are urged by the learned counsel for the defendant upon which they hope to take the case at bar out of the operation of the principle applicable to contracts against

public policy. One is a canon framed by the counsel themselves, never yet announced by a court or text writer, and directly in the teeth of the authorities. It is that in procuring legislation publicity eliminates the immorality, or as they expressed it in a previous brief, "open contracts for open services valid; secret contracts for secret services void." And to fit their case to this newly born canon, they amended their original and supplemental bills, and set forth that the said contract of the 9th of August, 1895, was generally and fully known by the Council of Richmond and the public in general, and was well and thoroughly known to the Committee on Streets (page 90).

The last amended bill alleges (page 84) that the appellant had already expended, in procuring the Conduit franchise, between \$3,500.00 and \$4,000.00 in traveling, hotel bills, counsel fees, and other expenses, and (page 83) that the half of the franchise sued for vastly exceeds \$2,000.00; so that at the least the contingent fee of the appellant was to be \$5,500.00 for withdrawing his Conduit ordinance and *co-operating* with Sheild in securing from the Council the franchise proposed by the Traction Company, and if he is to get the one-half of that franchise, without subscribing and paying for the stock, his contingent fee will be his said expenses and \$150,000.00 face value of stock in the Traction Company. And if he has to pay for the stock, he estimates it is worth more than \$2,000.00 above par. Here then is a large contingent fee to be paid the appellant and his associates for their withdrawal of competition and co-operation in securing their rival's franchise.

Under the authorities we have cited, this part of the agreement can bear no two constructions; it is plainly against public policy, being corrupting in its tendency, both because of the contingency in the fee for services to be rendered, and for the withdrawal of competition in a matter affecting the public.

The case of *Mills v. Mills*, 40 N. Y., 543, *supra*, is very similar to this. There certain parties agreed that a bill pending before the Legislature for the privilege of building and operating a street railway in Brooklyn should be amended, so

as to limit the grant to the parties to the agreement, and that the rights to be conferred by the law should, after its passage, be transferred to one of the parties, the other party agreeing to procure the passage of the law for his benefit. The court held the contract void on the ground of public policy, and further laid down the rule, that in such cases it is not necessary to adjudge that the parties stipulated for corrupt action, or intended that secret and improper resorts should be had.

In *Chippewa Valley, etc., R. Co. v. Chicago, etc., R. Co.*, 75 Wis., 224, *supra*, the contract was that one company should cease negotiation for a land grant, and should render to the other "all such reasonable and proper assistance as they should be able to give in the premises," to enable the other company to obtain the grant. And as a consideration, the company so rendering assistance was to share in the grant after it was obtained. Surely the words "co-operate in securing a franchise," used in the said contract of the 9th of August, 1895, are much broader and more liable to abuse in operations under them than the above, and are not restricted by the terms "reasonable and proper assistance." Yet in that case, when it was urged that a presumption existed in favor of its legality, and among other grounds that the assistance might have been publicly given and in legitimate ways, the court held that the contract was in itself against public policy, and for that reason must be held void, although it might have been and actually was complied with by lawful means.

Amongst other authorities cited by the learned Judge is *Fuller vs. Dame*, 18 Pick. (Mass.), 472, also cited in *Marshall v. B. & O. R. Co.*, 16 How., 336, in which Shaw, C. J., for the court, said: "It was strongly pressed by the counsel for the plaintiffs that when a contract is made in general terms, broad enough to include things lawful and things unlawful, it shall be presumed that they intended only those which were lawful. * * * The law goes further than merely to annul contracts where the obvious and avowed purpose is to do or cause the doing of unlawful acts. It avoids contracts and promises made with a view to place one under wrong influences—those which

offer him a temptation to do that which may injuriously affect the interests of third parties." See also *Weed v. Black*, 2 Mac. Arthur, 268, 275.

Against the American doctrine of public policy so unanimously announced, the learned counsel rely upon certain English decisions, and mainly upon the authority of Lord Cottenham. In the subsequent cases of *Earl of Shrewsbury v. North Staffordshire Railway Co.*, L. R., 1 Eq. Cas., page 616, and *Edgerton v. Earl Brownlow*, 4 H. of L. Cases, 1, the cases relied on by the appellant, if, indeed, authority for his position, have been overruled, and the English doctrine as to public policy now coincides with the American. In the last mentioned case, the court is referred to the opinions of Lord Lyndhurst, page 163; of Lord Brougham, pages 174, 178, 179; Lord Truro, pages 201, 202; and of Lord St. Leonards, pages 233-234. The sum of all the cases is that such contracts as the one sued on here are unlawful in themselves, because of their tendency to injuriously affect legislation, and their temptation to employ unlawful means to attain their end. As was said in *Trist v. Child*: "The law meets the suggestion of evil and strikes down the contract from its inception."

It is plain that the agreement as to the mode and manner in which the franchise was to be obtained from the City Council was such as has been condemned by the courts time and again. The said contract provides that the parties were to decide thereafter upon *the policy* to be used in procuring the franchise. That *policy* as agreed upon is stated on page 88 of the last amended bill, as follows:

"A candid statement and explanation of this action was to be made before the Street Committee or the Council of the City of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf your orator and his associates, was to apply to and secure from the Council of the city of Richmond the franchise set out in the said contract of August 9th, 1895." Here was plainly left to the discretion of said Sheild what method or policy he would use in procuring the said franchise. In the case of *Bryan v. Reynolds* 5

Wis., the words were "such claim to be brought before the Legislature in such mode and manner as my said agent and attorney may have the same presented." In *Trist v. Child*, the agreement with Trist was, that Child "should take charge of the claim and prosecute it before Congress as his agent and attorney." In *Elkhart Co. v. Crary*, 98 Ind. 238 the stipulation was for the use "of only proper persuasion." And in *Sweeney v. McLeod*, 15 Oregon 330, the stipulation was merely that the plaintiff would "by means of all legitimate importunity and submission of evidence, to prevent the passage of any law," etc. In *Tool Co. v. Norris*, *supra*, the contract was that Norris should secure a contract from the government.

In all of the preceding cases the contracts were condemned as being illegal by their terms. In the language of Judge Cassoday "none of these stipulations were sufficient to save either of such contracts from the condemnation of the respective courts. Where the principal object and purpose of an agreement is to secure, by a promise of a compensation contingent upon success, influence upon or with members of a Legislature or executive or other public official, it is none the less vicious in its tendencies because it is therein stipulated that such influence shall be 'reasonable and proper' the precise point is that such agreement, for such purchase of influence, is against public policy, and therefore void."

The discretion reposed in Sheild was unlimited and therefore more liable to abuse than the discretion allowed in the cases cited. And a contingent compensation was promised him in the repayment of his former expenses and he is represented by the bills as a designing and corrupt man, the very kind of man that is described in *Powers v. Skinner*, *supra*, when the court said, "The law will not concede to any man however honest he may be, the privilege of making a contract which it would not recognise when made by designing and corrupt men."

But the statements in the original bill throw a flood of light on the services agreed to be performed, and clearly show that they were what is known and condemned by the courts as

lobbying, and that such services were actually performed on behalf of the petitioner. In that bill (pp. 4 and 5) it is stated that while the petitioner was visiting Richmond urging his Conduit scheme, he became aware that certain parties, under the name of the Richmond Traction Company, were seeking the same franchise. "But these parties appeared to be without money or resources or *influence*." In striking contrast with this, he states the influence acquired by the petitioner and his associates over the City Council. He regarded "themselves as having altogether the *inside track*." They "appeared to be, indeed *were, masters of the situation*" (p. 4). Sheild is described as scheming to "get the *Conduit workers, who seemed to have the ear of the Council*" (p. 7), and it is stated that he succeeded in his endeavor (p. 8). There cannot be two meanings to these statements. They mean that the petitioner and his associates had exerted a *personal influence* over the members of the City Council in behalf of their Conduit scheme, which Sheild had failed to exert for his competing scheme, but which he determined to enlist in his behalf if possible.

That this influence was enlisted in behalf of the Traction scheme, as contracted for in the agreement of 9th August, 1895, is plainly stated (p. 8), and made a ground for recovery in this suit, in that it is given as a part of the compliance "in full measure" by the petitioner with his obligation under said contract. He says, upon his request, "your orator's entire working force went over at once to the Traction side openly and heartily," and worked with it in good faith "for the passage of the ordinance, some of them actually up to the very day the Board of Aldermen finally concurred in the ordinance as passed by the lower house" (p. 9). Now, remembering that these very workers had previously obtained from the Council an expression of preference for the Conduit scheme over the Trolley scheme, it could not be that they relied on argument to prove that the Trolley scheme was preferable. It must have been that they persuaded by personal appeals, or by some other personal influence, the members of the Council to adopt the Traction ordinance, in order that they might favor the peti-

tioner and his associates. In other words, having previously got control of the Council, as alleged, they now exerted that control by getting it to vote for a scheme it had refused to vote for before.

This use of personal influence has been condemned by this court in a number of cases, commencing with *Marshall v. B. & O. R. R.*

This Case not within the Class of Contracts represented by *Brooks v. Martin*, 2 Wall. 70

But the learned counsel for the petitioner take the ground (p. 75, &c., of their brief) that the contract, though contrary to public policy, has been consummated, and as one party has appropriated all the benefits, the court should aid the other to obtain his share; and they rely on a line of cases in which they give *Brooks v. Martin*, 2 Wall. 70, prominence. Before examining these cases, let us revert to the breach of contract sought to be enforced.

In the original bill (p. 10) and the last amended bill (p. 91) the petitioner relates an interview with Sheild on 23d August, 1895, three days before the Traction ordinance came up for action before the second branch of the City Council (pp. 11 and 91), in which interview Sheild admitted that "he had made other arrangements; in other words, he had dropped your orator and his associates." And it is added by the petitioner, "Repudiation of such obligations, at such time and under such circumstances, struck your orator dumb with amazement," &c. And in his card of the 26th August, the day the aldermen were to act (pp. 12 and 93), he admits the breach of the contract of the 9th August by Sheild as already made, and threatens suit to enforce compliance. Here, then, was a repudiation of the contract sued on before the ordinance was obtained, for which the contract had been entered into. This distinguishes this case from those relied on, in which the breach of contract occurred after one party had, by virtue of the contract, gotten possession of its fruits, and makes it doubly sure that the suit is to enforce the contract, as is indeed plainly stated in the bills.

But the doctrine as contended for is unsound. The mere appropriation by one party of the benefits of an illegal contract, after such contract has been consummated, does not warrant courts to enforce such contracts at the suit of the other party. In every case cited heretofore, in which this court and the State courts have refused to enforce such contracts, they had been consummated, and the defendants were in possession of their benefits, and the plaintiffs sued to force them to comply with their contracts. It cannot be, therefore, on that ground that such contracts can be enforced, as claimed by the learned counsel.

Nor does the fact that the parties to such contracts agreed to divide the profits of their enterprise, put the plaintiff in any better position, whether they are treated as partners or not. In the case of *Tool Co. v. Norris*, the plaintiff claimed under a contract for a proportion of the profits. *Mequire v. Corwin*, one-half of an attorney's fee was bargained for. In *Oscangan v. Arms Co.*, a commission on sales was promised the plaintiff. In *Hunter v. Nolf*, and *Atchison v. Mallen*, the agreements were to divide receipts. In *Chippewa Valley &c. v. Chicago R. R. Co.*, *Gray v. Hook*, and other cases which might be mentioned, the agreements were like the one here, to divide what might be realized from the enterprise, and in *Powell v. Mequire* (43 Cal. 11), the agreement was almost identical with this. We submit therefore, that the agreement to divide does not help the plaintiff.

What then is the distinction on which the cases cited by the petitioner turned? It is this: *If the ground of relief is a contract subsequent to, and independent of, the illegal contract, and not requiring the enforcement of the illegal contract, it may be enforced.*

The first case in this court relating to this doctrine, was *Armstrong v. Toler*, 11 Wheat. 258, which was on a contract to pay for goods imported contrary to law. Chief Justice Marshall, delivering the opinion of the court (pp. 271-2), said:

"No principle is better settled than that no action can be maintained on a contract, the consideration of which is either

wicked in itself, or prohibited by law. How far this principle is to affect subsequent, or collateral contracts, is a question of considerable intricacy, on which many controversies have arisen, and many decisions been made"; and he concludes (278): "That where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it, and if the contract be, in fact, only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it."

The case of *McBlair v. Gibbs*, 17 How., 232, arose on an assignment by the decedent of the plaintiff, to the decedent of the defendant, of an interest in an illegal contract, touching a military expedition against the dominion of Spain. The money claimed under the contract, had been paid to the assignee. The claim of the plaintiff was, that the contract being illegal, the assignment of it was void. The court refused to sustain this ground, holding, that the assignment to a third person, no wise connected with the illegal transaction, was good against the assignor. The English cases were reviewed, and the conclusion arrived at by Nelson, J., speaking for the Court, was, that "the assignment was subsequent, collateral to, and wholly independent of the illegal transactions upon which the principal contract was founded," and therefore valid between the parties to it and their privies (pp. 235-6).

In *Brooks v. Martin*, a partner in purchasing land warrants had first violated the law by purchasing soldiers' warrants before they were issued. This defect had been afterwards cured as to many if not all warrants so purchased. He had been trusted as the *agent* of the other partners, and having sold and realized in money a large proportion of the assets of the firm, had perpetrated a fraud on his partner in purchasing his interest in the assets. The court set aside the fraudulent purchase, and held that the defense that the transactions out of which the money or a part of it arose was illegal, was not good in the case, and quoted, with approval, the statement of the principle as laid

down by Lord Cottenham in *Sharp v. Taylor*, to-wit: "That the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties," and that the difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant v. Elliot* (1 Bosanquet and Puller, 3) and *Farmer v. Russell* (Id. 29), and recognized and approved by Sir William Grant in *Thompson v. Thompson* (7 Vesey, 473).

In *Brooks v. Martin*, Catron, J., dissented on the ground that the partnership was formed to violate the act of Congress and public policy, but the majority held that the defendant, having admitted his indebtedness to the plaintiff after the close of the illegal transactions, *an assumpsit had arisen which was enforceable*. But there were also other potent elements in the case. The defendant was the trusted agent of the plaintiff, and after admitting an indebtedness, had deceived him in the settlement sought to be set aside. At page 79, Miller, J., who delivered the opinion of the court, used language directly applicable to the case at bar. He said: "*If Brooks, after the signing of these articles of partnership, had said to Martin, 'I REFUSE TO PROCEED WITH THIS PARTNERSHIP BECAUSE THE PURPOSE IS ILLEGAL,' Martin would have been entirely without remedy.*" HERE SHEILD REFUSED TO PROCEED WITH THE CONTRACT OF 9TH AUGUST, 1895, which is illegal, BEFORE ITS CONSUMMATION, and the defendants, as shown by the bills, have never admitted any obligation under it, or assumed any, but have persistently denied any such obligation from the time the petitioner first claimed it in his card of 26th August, 1895. By this authority, on which the petitioner relies, therefore, it plainly appears that he is without remedy.

The case of *Thompson v. Thompson*, approved in this case, contains a clear statement of the principle applicable in such cases as the one at bar. There the sale of a command of an East India ship had been illegally made for a stipulated annual payment of £200 to the previous commander. Afterwards the purchaser resigned the command, and received an

allowance from the company of \$3,540 as a retired commander. The bill was filed to enforce the payment of the annuity by an investment of part of this fund, and it was defended on the ground that the contract to pay it was illegal. Sir William Grant sustained the defense, and in doing so said: "There is no claim to this money except through the medium of an illegal agreement. * * If the case could have been brought to this, that the company had paid the money into the hands of a third party for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust; but in this instance the money is paid to the party. * * How then are you to get at it except through this agreement? There is nothing collateral in respect to which, the agreement being out of the question, a collateral demand arises." This fits the case at bar.

The case of *Texas, &c., Ry. Co. v. S. P. Ry. Co.* (41 Louisiana Annual, 970, and 17 Am. Rep., 445), is also clear as to this doctrine. There the suit was to enforce the payment of a balance under a pool agreement between the Ry. companies. The court held the agreement to be against public policy, as tending to stifle competition, and refused to enforce it. In this case the same ground was taken for the plaintiff, as is taken here for the petitioner, to-wit: that in so far as the contract had been executed, there was a right to recover. But the Court said: "The rule is, that no effect can be given to a contract reprobated by law, or contrary to public policy, and hence courts cannot lend their aid even to secure an otherwise fair division of the results of an illegal contract between the parties thereto." And after repeating the words of the Court, in *Gibbs v. Bal. Gas Co.* (p. 410), that "the rule of law is of universal operation, that none shall by the aid of a court of justice, obtain the fruits of an unlawful bargain," the court states the distinction on which the case of *Brooks v. Martin*, was decided, and says that it was not in conflict with the general rule.

The case of *Chicago &c. Ry. Co. v. Wabash &c. Ry. Co.*,

Circuit of Appeals, Eighth Circuit, 61 Fed. Reporter, p. 993, also arose on an effort to obtain a division of earnings under a pool agreement. The Court, Cardwell, J., delivering the opinion, refused the relief prayed for. And noticing the ground urged, that "the contract had been performed, and the appellee is bound to account for moneys received under the contract, according to its terms," the Court said: "This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and this suit is in legal effect, nothing more than a bill to enforce specific performance of that contract. * * * The case of *Brooks v. Martin*, 2 Wall., 70, is not in point. In that case, the defendant set up an illegal contract, which been fully performed and executed, as a defense against a demand that existed independently of the contract."

In *Armstrong v. Am. Ex. Bk.*, 133 U. S. 433, 469, this court stated the distinction plainly in these words:

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case." And cited for this distinction the following cases relied on by the learned counsel for the petitioner to support their position:

Falkney v. Reynolds, 4 Burrow 2069.

Petrie v. Hannay, 3 T. R. 418.

Farmer v. Russell, 1 B. & P. 296.

Planters Bk. v. Union Bk., 16 Wall. 483.

McBlair v. Gibbs, 17 How. 232.

Brooks v. Martin, 2 Wal. 70.

Bly v. Second Nat. Bank, 79 Penn. St. 453.

So that these cases have received a judicial construction by this court adverse to the petitioner.

As the suit of the petitioner is to enforce his original illegal contract, and his prayer in all his bills is to that end, and he does not pretend that he relies on a subsequent, or collateral, contract supported by an independent consideration, he brings

himself wholly within the rule just cited from *Gibbs v. Bal. Gas Co.*, and under the condemnation of the above authorities cited by him. They show that when this court said that "there is a distinction between enforcing an illegal or prohibited contract and the assertion of a title to funds that had been realized out of such contract," (*Barek v. Taylor*, 152 U. S. 668) the court meant that such funds could only be reached by some other means than the illegal contract; that the case presented must be one in which the "plaintiff does not require the aid of the illegal transaction to make out his case."

Judge McCrary, in *Cook v. Sherman*, 20 Fed. Rep. 170, cited by Simonton, J., in the case at bar, states the distinction as above given. And there can be no question that this is the test of the principle on which the line of cases like *Brooks v. Martin*, relied on, turned. In none of these cases do the courts deny the general rule that in suits to enforce illegal contracts, courts of justice will deny relief, the parties being considered *in pari delicto*, but in every case in which relief was granted the court saw, or believed it saw, another contract, based on an independent consideration, "so that the defendant did not require the aid of the illegal contract to make out his case."

See also,

Setter v. Alvey, 15 Kansas, 157.

Bagott v. Saurger, 25 S. E. 405.

Craft v. McCough, 79 Ill. 346.

An examination of the cases relied on for the petitioner shows no authority in conflict with these authorities.

The case of *Antoine v. Smith*, 49 Louisiana Annual Rep., 560, arose on a claim against a trustee to recover 200 shares of the capital stock of a Lottery Company. The trustee was bound to deliver the stock he held in trust to the owner, independently of the illegal manner in which the owner acquired title, as the trustee had no claim to it as his own property, but simply held for the claimant. Here the court enforced a trust which was independent of the illegal transactions plead in defense.

The case of *Manchester, &c., R. R. v. Concord R. R.*, 66 N. H., 100, arose from a contract for the possession and operation of the plaintiff by the defendant railroad, and the plaintiff sought the return of its property and an account of what was done under the contract. The court held that the contract was not against public policy, but valid and binding. The discussion, therefore, of the doctrine of *Brooks v. Martin*, if not *obiter dictum*, was not necessary, and in so far as it is sought to construe it differently from the construction put upon it by this court in *Armstrong v. Am. Ex. Bank*, *supra*, and other authorities cited, is not to be allowed.

In *McMullen v. Hoffman*, 75 Fed. Rep., 547, arising on an agreement between contractors with the city of Portland, the court held the contract sued on "was to do a lawful thing," and added: "It is only when the fraud is the result of an immoral transaction that contribution between wrong-doers will be denied."

In *Willson v. Owen*, 30 Mich., 474, the suit was against the treasurer of a Horse-Fair Association. The treasurer only held the money in trust for the plaintiffs. He was bound to pay it to them, irrespective of any illegality in the conduct of the horse-fair. The court said that had the treasurer been a party to the illegal transaction, the recovery would be barred.

In *Gilliam v. Brown*, 43 Mississippi, 641, the illegal traffic in cotton during the late war was not held by the court as being by parties as *partners*. The third instruction granted the plaintiff by the Circuit Judge (page 658) and approved by the Appellate Court, is thus described: "This instruction asserts the proposition that although the traffic in cotton between a resident of De Soto county and parties residents of Memphis, Tenn., was illegal, at the time part of the transactions out of which this suit originated were carried on, yet if James C. Brown took the plaintiff's cotton, with his consent, and as his agent carried it to Memphis, and there sold it and received the money, which his executor, the defendant, still had * * * the plaintiff was entitled to the money, the proceeds thereof." Here the person who received the money arising from the ille-

gal traffic was an *agent*, and the courts have never allowed him to withhold the money of his principal on the ground that that principal had his right to the money tainted by some illegal transaction. No such defense is allowed to an agent or trustee, whose obligation is to pay the fund in his hands to the principal. The long extracts from the opinion in this case made by the learned counsel, are to be taken in connection with the real question before the court, and are only of force in that connection. If it is shown that the court said anything conflicting with the doctrine of this Court and of the many other State Courts heretofore stated, it will only show that this Mississippi Court is in error, and its opinion of no weight.

The case of *Martin v. Richardson*, 42 Am. St. Rep., 353, 94 Ky., 183, was one against a man, who having fraudulently obtained another's lottery ticket, which had drawn a prize, collected the money and refused to pay it over. Here was plainly a case of one having fraudulently obtained the money of another and refusing to pay it over, and the court held he was in effect, the agent of the plaintiff.

Remedy at Law.

The petitioner has a plain, adequate, and complete remedy at law, if any he has, and therefore equity has no jurisdiction.

The petitioner sues upon a contract which he claims entitles him "to a full one-half interest in the Traction Company's enterprise and franchise," and he prays that he may be decreed "to have a right and claim to a full one-half interest in the said Richmond Traction Company's franchise, enterprise, property and stock," (p. 16). This prayer is repeated in his amended bills (p. 111). So that, as the franchise, enterprise, and property of the company, are represented by the stock, he asks to be decreed one-half of the stock, which he states had been fully subscribed for by the defendants (p. 99). The Act of Assembly (see Appendix), fixes the maximum amount of stock at \$300,000, and the petitioner's bills state that this amount had been subscribed for by the defendants.

This then, is a suit for stock, claimed by the petitioner under his contract, and withheld by the defendants. *Story on Equity*, §724, says: "The doctrine seems to be well settled, that a contract for the sale of stock, will not now be decreed to be specifically performed, because it is ordinarily capable of exact compensation." In *Merchan. Bank v. Seton*, 1 Peters, 305, this court held that on a breach of contract for the sale of stock, the remedy was at law.

See *Ross v. Union Pas. Ry. Co.*, Woolw., 26; *Eckstein v. Downing*, 64 N. H., 248; *Bungardner v. Learitt*, 35 W. Va., 202; also *Cook on Stockholders*, § 335, and *Lindley on Partnership*, p. 914.

The case of *Powell v. Maguire*, 43 Cal., 11, 19, affirmed in *Thomason v. De Greayer*, 31 Pac. Rep. (Cal. 1892), 567, is exactly to the point. There, as here claimed, promoters agreed to get a franchise in the name of one, and then divide it. On obtaining it, the one in whose name it was granted, refused to allow the other any interest. The court held it was a case for damages at law, and not in equity. In doing so it looked upon the promoter's agreement as one for a partnership, as has been urged here, and held that such an agreement could not be enforced by specific performance. The two cases are as much alike as the two Dromios.

In *Thomason v. De Greayer* (Cal.), 31, Pac. Rep., 567, which was an action on the part of the plaintiff to have his name inserted as one of the parties to a contract between the defendant, and a corporation (for paving). The Court said:

"It is alleged that the terms of a co-partnership between plaintiff and De Greayer, to do the work of paving, etc., of five miles of track for said corporation, were fully agreed upon by the parties, but this was before any contract was obtained, and the partnership was therefore never 'launched.' This being so, the rule declared in *Powell v. Maguire*, 43 Cal. 11, is applicable."

There has not been pointed out anything about the stock in question, which takes it out of the general rule. Its value

can be easily estimated, indeed, is put by the plaintiff himself at par, when he insists that subscribers should pay par value, and if worth more, the excess would constitute the damages.

The claim that the petitioner is entitled, by being a stockholder, to take part in the management of the concern, would apply to every case of a claim for stock.

It is to be remembered too, that the breach of the contract between the parties, is alleged to have occurred before the company was incorporated, and consisted in refusing to put the petitioner's name among the incorporators provided by the ordinance, and in refusing to recognise him as interested in the enterprise. The money value of his loss, by reason of this breach, is easily ascertained. He himself puts it at the amount he had expended in urging his Conduit ordinance, and the value of one-half of the Traction stock. To give him in damages, his expenses, and the market value of the stock claimed, less its par value, would give him a *plain, adequate, and complete* remedy.

This a court of law could and would do, if he proved his case, and as he has this plain remedy at law, he has none in equity (§ 16 Judiciary Act, 1 Stat. 82, § 723).

The learned counsel, heretofore pressed by this argument, now shift to inconsistent grounds, and claim (p. 109 of their brief) that the contract sued on created a partnership relation between the parties, and that the remedy at law is not adequate in such a case. This is to claim that after a contract of partnership is entered into, and before the partnership has acquired any assets or entered upon its business, if one party repudiates the contract, the other can, in a court of equity, enforce specific performance. This is against all authority. A partnership being a confidential relation, must be *voluntary* (Collyer on Partnership, § 8; Lindley on Partnership, 914). Here Sheld, while the efforts were being made to obtain the franchise which was to be the subject of the partnership, repudiated the contract, and the professed object now is to force him and his associates to receive the petitioner as a partner.

No authority is cited for such a proposition, nor can there be. The case of *Stringfellow v. Wise*, 27 S. E. Reporter, 432, relied on, was one where advances in the shape of labor, materials and money had been made for a proposed partnership never consummated. An account was allowed between the parties, but the parties were not forced to carry out the proposed partnership. In the case at bar the petitioner asks no account of his advances—he can render that himself, if he made any—but asks to be forced into a partnership with the defendants.

The case of *Stuart v. Pennis*, 91 Va. 688, cited for petitioner, is not at all to the point. There a man sold the trees on a piece of land for three years. The court held that the trees were a part of the realty; but had they not been, the purchaser had a right to keep the trees standing for three years, and his profits would be difficult to estimate. But in addition, it appeared that the vendor refused to allow the vendee to come on the land to count the trees, and the court gave that as a reason for equitable relief, as it obstructed the remedy at law. No partnership or stock was involved.

Misled by this case, the learned counsel have admitted an alternative construction put upon the contract by counsel for the defendants, the other construction being that the promoters intended to sell the franchise and divide the money.

They quote, with approbation, the following sentence from our first brief in the Circuit Court: "If it (the contract) entitles the plaintiff to anything, it entitles him to a certain sum of money, represented by one-half of the profits of the Traction Company, realized during its existence—to-wit., from 28th August, 1891, the date of the city ordinance, to 1st January, 1926," when the charter under the ordinance expires. (See their brief, pp. 107-8.) This admission is fatal to their case, for if the construction is correct, there can be no right of action for the breach of the contract till 1st January, 1926, as until that time the amount claimed by the petitioner as his share of profits cannot be ascertained, nor become due.

But granting that the contract is not tainted with immorality, the petitioner can have no remedy in Equity, even if he has none at Law, because the

Petitioner's Conduct and the Relief he Seeks are Inequitable, and the Prayer of his Bill Cannot be Granted.

Says Pomeroy, §399-400: "The principle was established from the earliest days, that while the Court of Chancery could act upon the conscience of the defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing, which it is the purpose of the jurisdiction to sustain * * * The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to or at all events connected with the matter in litigation, so that it has in some measure effected the equitable relations subsisting between the two parties and arising out of the transaction. * * * A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages. * * * The doctrine thus applied means that the party asking the aid of the court must stand in conscientious relation towards his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant. By virtue of this principle, a specific performance will be refused * * * when the contract itself is unfair, one-sided, unconscionable, or effected by any such inequitable fea-

ture; and when the specific performance would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice."

We submit that in this case the plaintiff has so acted, and the relief he seeks is so harsh and inequitable that his bills should be dismissed.

In his said contract of the 9th of August, 1895, he describes himself as L. H. Hyer, of Washington, D. C. As a resident of the District of Columbia, he had no right to file a bill in the United States Court for the Eastern District of Virginia. He, therefore, in his bill to enforce said contract, which he takes care not to swear to, describes himself as "L. H. Hyer, a citizen of the State of Missouri, residing in Warrensburgh, Johnston county, State of Missouri" (page 2).

By his said contract he agreed to co-operate with Sheild, and his associates, in procuring the franchise for the Richmond Traction Company, yet while the ordinance was pending, and a few hours before it was to be considered by the Board of Aldermen and the Mayor, he published in an evening paper of the city, at a time selected when a timely answer through the same channel was impossible, his card of the 26th of August, (pp. 92-93) which plainly had for its purpose the defeat of the said ordinance, by throwing a discredit upon the good faith of the corporators seeking the ordinance, and upon their ability to properly exercise it if granted. In the said card he threatens a suit against the said Company, and then adds his belief that litigation will prove fatal to the enterprise. He asserts that he was entitled to one-half of the franchise; that Stewart & Co., bankers, were entitled to one-third, that Wm. F. Jenkins was entitled to about one-half; and that certain bankers in Richmond were to have a greater portion of the franchise for financiering the same.

As his half and Jenkins half would make the whole franchise, and Stewart & Co., would be entitled to one-third in addition, and the Richmond bankers would be entitled to a greater portion of the whole besides, the card contained the statement that the gentlemen composing the Traction Company were

utterly unreliable, and were already under contracts which it was utterly impossible for them to comply with. His excuse for publishing such a card was to give notice of his rights and claims under his contract (p. 92). That this excuse was a false one, appears by the statements in the bill (p. 90), that the said contract of the 9th of August was not only fully known to the Council but to the public generally, and that the promoters and incorporators had personal notice of it. This threat of a suit by the appellant was met by a leading member of the Traction Company, in the same paper on the next day, and after the ordinance had been passed by the Aldermen, in which he stated that he never heard of Mr. Hyer until he saw his card; that upon inquiry he was satisfied that his claim could not be sustained; that his action was probably inspired by the enemies of the Traction Company; and that the Company would pay no attention to his claim, but would commence their work soon after the Mayor approved the ordinance, preparation for the plans for the same being already well underway. This card was made a part of the appellants bill (p. 94). The appellant with a full knowledge that his claim would be resisted, persisted in attempting to have it allowed, or to force money from the Traction Company in satisfaction of it, by a course which can be described by no more appropriate term than that of blackmailing, the first steps in which was the publication of his said card of the 26th of August. His next step was his notice to the corporators dated the 3d of September, 1895, threatening forthwith to apply to the courts to stop them from issuing bonds or stock, if the rights of himself and his associates were not recognized and conceded; a notice entirely unnecessary as a notification of his claims, as it concludes with a disclaimer of an admission that said incorporators were not all along aware of his asserted rights. Instead of filing his bill forthwith upon the passage of said ordinance or service of said notice, he waited till the 30th of October, 1895, nearly two months, before filing it, and this with a full knowledge that under the ordinance, the Company was bound to organize and

commence its work within ten days from the approval of the ordinance by the Mayor, to-wit by the 7th of September.

Had he had any confidence in his claim he would have filed his bill immediately upon the passage of the ordinance, and gotten the court to order the corporators to allow him to subscribe for half of the stock upon the organization. In the bill which he filed, he prayed that the corporators, parties defendant, be enjoined and restrained from transferring or encumbering the franchise or property of the said Richmond Traction Company, or any part thereof, or any interest therein, or from issuing any stock or bonds of said Company, or in any other way borrowing money for the use of said Company upon its franchise," p. 16.

In other words, that the operations of the Company be suspended. This bill was not presented to any judge for action by preliminary injunction, as it should have been if its allegation was sincere, that the appellant would be exposed to irreparable injury if his prayer was not granted. Although a demurrer was filed to this bill the day after the bill was filed, the appellant did not join in the demurrer, nor ask for it to be set down for hearing at once, but on the 14th of November, he asked to amend his bill, and on the 4th of February, 1896, he asked to file another amended and supplemental bill.

In pursuance of permission granted him on the 4th February, 1896, the plaintiff filed an amended and supplemental bill, complaining of the issuance of stock and bonds by the company, and of a mortgage to secure the bonds, dated 1st November, 1895, and recorded 4th November, 1895, and after repeating the prayer of his original bill, praying in addition for an injunction to prevent the issue or disposition of the said bonds, and to prevent "The Traction Company, its officers, &c., from entering into any contract or incurring any debt or liability, or exercising any of the rights, powers, functions, or privileges of the Richmond Traction Company, and that a receiver may be appointed" (p. 44); he also prayed that every act of the said company be annulled (p. 44). He thus asks

that the enterprise be killed, as the ten days to begin work had long before expired, and more than five of the nine months allowed to finish the work had passed. This bill was at once demurred to and the heads of the demurrer were stated. And the demurrer was ordered to be heard during the term. This demurrer exposed the fact that under certain allegations in the bill, the appellant was seeking relief on transactions plainly against public policy.

On motion of the defendants on the 11th day of February, 1896, the plaintiff showing no desire for a hearing, the cause was set for the 1st day of April, 1896 (p. 65), though the appellant had not yet joined in either of the demurrers.

But instead of coming prepared for said hearing the appellant filed a long petition, asking that he might further amend his bills and strike out certain passages and insert others, as we have seen, with the purpose of cleansing his case. His bill, so amended, was filed 15th April, 1896, and a demurrer was filed to this at once (p. 119), though it is incorrectly stated in the record as having been filed the 4th of May. Finally, upon the 5th of May the cause was heard. Up to that time the appellant had not moved the court to grant the injunctions prayed for, while by the ordinance he had exhibited with his original bill the franchise would have been forfeited if work had not commenced on or before the 7th of September, 1895, and the work must have been so far advanced at the hearing as to be completed by the 28th of May, 1896, and by the showing of the amended bills the money to construct the railway had been altogether raised on bonds of the company, then prayed to be annulled, and their issue, together with every act of the company, to be declared unlawful and void, but their property to be divided with the appellant.

Now what does all this harsh remedy prayed for, and not pushed, so as to prevent the actions complained of, actions obliged to be performed to save the franchise of the company, mean, but to allow the company to go on with its work, and then to wipe out the issue of stock and bonds if possible, and divide the property of which the company had gotten poses-

sion, without paying its obligations. A more iniquitous proposal was never submitted to a court of justice. The learned counsel in argument, admit that the plaintiff did not push his prayer for injunction, because he did not want to kill or cripple the company he sought an interest in; what was his intention then, unless it was blackmail in trying to force allowance of his claim by threatening destruction of the company, if it was not allowed? Indeed, this plaintiff has gone so far in his amended bill, as to attack the constitutionality of the act granting the charter to the corporation in which he claims half interest. We have learned of nothing equal to this since the days of Solomon, when a spurious mother confessed herself willing to kill the child she claimed, and divide its dead body, rather than the true mother should have her live child to nourish. The judgment of Solomon in that case is a prevalent precedent in this.

But if the appellant could clear himself of this improper conduct, exhibited in the record, he still would be in the attitude of one asking for half the franchise in a corporation, which could not be granted except by the issue to him of one half its capital stock, and he prays this, without ever having offered in his bills to subscribe and pay for the same, and without giving any excuse for not offering to furnish half the \$10,000.00 required to be deposited by the company as a guarantee for the performance of the ordinance, which brought the company into existence, and gave that existence continuance, a very different sum from that withdrawn by the appellant, 17th August, 1895.

The learned counsel rely much on the retention in Richmond of \$10,000.00 by the petitioner, until that date. It is evident however, that that had no influence on the action of the Council. The contract states that this deposit in the State Bank, was to be "subject to any conditions for the withdrawal thereof, made by Mr. Hyer with the depositor, after the 17th August, 1895." Then the deposit was not to the credit of the city, but of a third person, described as "the depositor." The lower branch of the Council met, and passed the Traction or-

dinance, on 14th August, 1895 (pp. 90 and 91), which required that company to *deposit with the Treasurer of the city* within ten days from the approval of the ordinance, bonds of the city of Richmond, or U. S. currency, for \$10,000.00, to be forfeited to the city if the company failed to commence work within ten days, or complete it within nine months (p. 18). *This deposit secured the franchise to the Traction Company.* It was not the money previously deposited by some one at Hyer's instance, to be withdrawn on 17th August, 1895, and actually withdrawn that day, as stated in the bills (pp. 88 and 89), but an amount furnished by the corporators of the Traction Company, after the approval of the ordinance on 28th August, 1895, and the withdrawal of the previous deposit by Hyer's friend. And of this last deposit, the petitioner should have furnished one-half according to the interest he claims in the company, but not one dollar of which he ever offered to furnish, so far as his bills show. It is therefore useless to claim that the first deposit was the basis of the Traction Company's application for its franchise, unless it is also stated that this sum was not subject to withdrawal by the depositor, but was put to the credit of the Treasurer of the city, as required by the ordinance, which is not alleged, and was not the case. The sum deposited in the State Bank, was withdrawn before the final passage of the ordinance, and therefore could not have caused that passage.

The plaintiff's bill was filed 30th October, 1895 (page 2), and his amended bill, at page 37, states that some time in September, 1895, the whole of the capital stock was subscribed for by others. Thus the defendant company was disabled from specifically performing the contract as asked, if ever bound by it, before the plaintiff sued. Indeed, the counsel for plaintiff are understood as admitting that it is not in the power of the company to specifically perform the contract sued on, as it has not the stock to deliver. So the doctrine in *Kennedy v. Hazelton*, 128 U. S., 667, is applicable here, as the plaintiff asks what the company is not able to perform.

Again, the complainant asks for a relief which no court

can grant. The corporation cannot be forced to take him as a stockholder, and if the present holders of stock could be made to transfer to him one-half of their holdings, that would not satisfy his demand, for he claims that he cannot have full relief unless the company and its franchise be discharged from the consequences of its organization, and from all contracts, debts and liabilities contracted in its name. And how is this to be done? Are all obligations to be repudiated? Are all completed contracts to be re-opened and annulled? And are the stockholders, including the appellant, to be relieved of all obligations while they hold the fruits thereof, or is only the appellant to be so relieved? And finally, is the corporation to be declared illegal and its franchise forfeited, and then the appellant to have half of nothing?

If the court were to undertake to grant the relief prayed for, it would find itself hedged in by innumerable difficulties.

The excuse for not offering to subscribe for half of the company's stock, is not sufficient. When, in the notice to the incorporators, 3d September, 1895 (page 95), Hyer claimed "a full half interest in the franchise," why did he not also offer to subscribe for half of the stock? He knew that by the 8th September the company must organize, commence work, and put up \$10,000.00, and that the stock would be subscribed for by that time. Yet he does not offer to subscribe, nor to aid in raising the \$10,000.00. Such offers were essential to the preservation of the rights he claimed.

The learned counsel (p. 98 of this brief) claim that while the allegation of a fraudulent intention in the defendants is not admitted on demurrer, yet its truth is admitted "in so far as requisite to give the court jurisdiction." This remarkable proposition, advanced only on the authority of the learned counsel themselves, is contradicted by all other authorities.

Bazard v. Houston, 119 U. S., 347-352.

Sumestlin v. Silver Min. Co., 41 Fed. Rep., 249, 256.

Carmody v. Powers, 60 Mich., 26.

It ignores the fact that the intention of the defendants

must be shown by their acts, and not by allegations of the plaintiff. The passage shows, however, the motive of the petitioner in his reckless charge of fraud against the defendants. That charge was made, not because true, but to obtain a foothold in a court of equity. Such a court, on the discovery of the motive of the bill, will drive the libeller from its halls.

Procul, O procul, Este profanus!

Contract Wanting in Certainty and Mutuality.

The law on the subject of uncertainty is stated by Pomeroy on Equity, § 1405, as follows: "It (the contract sought to be performed) must be reasonably certain as to its subject-matter, its stipulations, its purpose, its parties, and the circumstances under which it is made." See, also, *Colston v. Thompson*, 2 Wheat (U. S.) 336. The contract here is uncertain in these particulars. Is the subject-matter the building of a street railway on Broad street, or simply the obtaining a franchise for that purpose, or both? What was meant by "mutually to co-operate one with the other in securing a franchise for said railway?" What was to be done under this provision of the contract? The plaintiff has stated different and contradictory duties. Was the purpose of the parties to form a partnership or merely to divide the franchise, or to divide what was realized from it by sale or exercise? Who were the parties? Who were the associates of Hyer, and who of Sheild?

All of these questions are left in doubt by the contract sought to be enforced, while all of them require a definite answer to specifically perform it. While by the agreement to "divide equally between us and our associates whatever may be realized from the enterprise," indicates a partnership, as in *Powell v. Maguire*, *supra*, the relief asked is for stock only, which negatives the idea of partnership, as partnership could only be dissolved by mutual consent, while the stock can be sold at any time. The attempt to make clear the contract by stating understandings of it not in accordance with its language is not allowable, as the paper must speak for itself, and not

through interpretations of parties, which are not allowed on demurrer. *Dillard v. Bernard*, 21 Wal., 430-437.

The case of *Hissam v. Parrish*, 24 So. E. Reporter, 600, decided by Supreme Court of West Virginia, is authority on this point, as also on the next to be noticed—to-wit: mutuality required.

Fry on Specific Performance, § 266, states the rule of equity as follows: "A contract to be specifically performed must be mutual; that is to say, such that it might at the time it was entered into have been enforced by either party." Hence, had Hyer refused, after signing the contract, to withdraw his conduit scheme from the Council of Richmond, or to co-operate with Sheild in securing the Traction charter, which he finally did, or if he now refuses to subscribe for half of the authorized stock, which he does not offer to do in his bill, no court could have forced, or can now force him. This position is fully sustained in *Smith v. Applegate*, 3 Zab. (N. J.) 352; *Moore v. Fitz Randolph*, 6 Leigh (Va.), 175.

The case of *Hissam v. Parrish*, decided March 21, 1896, is authority for several positions taken by the defendants here. There was a contract for purchase of stock by a corporation, but only signed by members of the company; the sale, however, was optional with the plaintiff. The court, in an able opinion by Judge English, held that the allegations in the plaintiff's bill, as to the consideration of the contract, could not be considered on demurrer, not being found on the face of the contract sued on: that there was a want of mutuality, as the defendants could not enforce it against the plaintiff, and there was an uncertainty as to parties, the body of the paper purporting to be a contract with a company, while the names signed were those of individuals. Here the plaintiff seeks by allegations to make a different contract from that set forth in the paper sued on; he is at liberty to claim the benefit of the contract or not, as he pleases; and if he declines to do so he cannot be compelled to carry it out by subscribing and paying for the stock he now claims, as he nowhere binds himself in the contract to do so, but leaves it optional with himself, and

if the court were to grant him the relief prayed for on condition that he pay for the stock, he could decline, and could not be compelled to do so. The uncertainty of parties, too, is apparent here. The plaintiff sues on a paper signed by himself and Sheild, and purporting to be on behalf of associates, not named, and attempts to hold a company liable, not then in existence and not named as an obligor, and corporators not then stockholders in the company.

Contract is one between Promoters which cannot be enforced against the Defendants

Under this head of the argument, we refer to the rule laid down in *Redfield on Railroads*, 5th Edition, § 6, page 18, as the proper one. "Whenever a third party enters into a contract with the promoters of a railway, which is intended to enure to the benefit of the company, and they take the benefit of the contract, they will be bound to perform it."

It will be seen that the contracts so binding, are restricted to those of *third parties*, with promoters, of which the corporations took the benefit. It is very different where promoters agree among themselves for a division of stock, or for other personal benefit.

In such cases the corporation is not bound, even if its existence was the result of the action of the promoters, as that action was merely intended for their benefit. Here it is contended that an agreement between promoters to divide *profits of an enterprise*, binds the future corporation to divide its *stock* between them. A mere personal contract which does not pretend to bind the proposed corporation to do anything. Those entitled to the profits are to divide, not the corporation. The learned counsel rest their argument on this point, on the decisions of Lord Cottenham, which were disapproved afterwards by Lord Campbell, Lord Romilly, Lord Cranworth, Vice-Chancellor Kindersley, and the House of Lords, as appears in the case of the *Earl of Shrewsbury v. North Staffordshire Railway Co.*, L. R. Eq. Cases, Vol. I, p. 616, and also in *Preston v. Liverpool, &c., R. Co.*, 5 H. L., Cas. 605. The

learned counsel in referring to this first decision, quotes from syllabus, which makes the decision to rest on the fact that the performance of the contract in that case, by the company, was *ultra vires*. But they do not state why it was considered *ultra vires* by the Court. An examination of the case, shows that the promoters promised to pay the Earl of Shrewsbury £20,000 to secure his support and countenance, in lieu of his opposition to the Act granting their charter. This, the Court held, was against public policy, although it did not appear that he did anything improper regarding the passage of the Act. And because illegal, the Court held it was not within the lawful powers of the company to pay the money, that it was therefore *ultra vires*, although the company had formally ratified the contract and assumed the payment of the money. In this case, the company owed its existence to a withdrawal of opposition by the Earl, and his counsel urged that as a ground on which it should be held bound, but it did not prevail. The same argument by the learned counsel here, must meet with the same fate. But we need not go to England for authority on this point, as we are full-handed with American decisions. In *Am. & Eng. Encyc. of Law*, Vol. IV, p. 391, note 1, it is stated that the "general principle is, that a corporation can only be liable for its own acts, done after it had legal existence. Promoters do not represent the corporation in any relation of agency, and have no authority to make preliminary contracts, binding the corporation when it shall be formed. Mere acceptance of the benefit of a contract, does not imply a promise on the part of the corporation to adopt and perform it." See also

1 Morawetz on Corporations, section 547.

Franklin Fire Ins. Co. v. Hart, 31 Md., 59.

Abbott v. Hapgood, 150 Mass., 252.

The American authorities given for this text are numerous. In *Carmody v. Powers*, 60 Mich., 26, which was a suit upon a contract with promoters for the sale of an engine and machinery for sawing, to be partly paid for in paid-up stock of a company to be formed, the court held (p. 30): "An agree-

ment with individuals, that when they become incorporated they will give plaintiff a certain amount of paid-up stock, cannot on any rule of law be considered as a dealing with the corporation itself, or as one which would bind the future corporation when organized." Here, it will be seen, that the fact that the company got the engine and machinery did not oblige it to issue the stock. But the learned counsel, after the effort to support their contention, that the Traction Company is bound by the contract of 9th August between the promoters, finally conclude that it is not essential to the establishment of their position, which they define to be not a recovery against the company by virtue of the contract; rather that the plaintiff had a right to be, and should have been, in and of the company.

THE EFFORT, THEREFORE, IS TO FORCE THE COMPANY TO RECEIVE THE PLAINTIFF AS A STOCKHOLDER.

No authority is cited, and none can be, we venture to say, for the proposition that a corporation can be forced to receive persons as stockholders who have never subscribed for the stock, or who having offered to subscribe, were refused the privilege by the incorporators. On the contrary, the law is that the Legislature entrusts to the incorporators the right and power to select the stockholders after the incorporation, and as the subscription is a contract with the incorporators, both they and the subscriber must agree to it.

Cook on Stockholders, &c., § 52.

Wood on R. R., § 21.

Powell v. Maguire, 43 Cal., 11, 21.

In this latter case the court was called on to enforce a contract between two persons, by which the franchise of a ferry was to be obtained in the name of one and his associates, and the two were to divide the franchise between themselves and their associates. The franchise was obtained, and then the person in whose name it was granted refused to divide, and put in a boat at his own expense. The bill asked for a specific performance of the contract, by letting the plaintiff into half

of the franchise. There could hardly be found a case more like the one set out in the plaintiff's bill here. The relief asked was refused. On page 21 the court says: "When the Legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the persons thereafter to be associated with him in the enterprise. * * If several persons desiring to obtain a franchise from the Legislature, in which they are all to be mutually interested, see fit to ask it in the name of one only, public policy requires that they should be made to rely solely on his good faith in carrying out the agreement; if he repudiates the contract on obtaining the franchise, a court of equity will grant no relief." The case made in the bill here is even stronger against relief than the one in *Powell v. Maguire*, for the plaintiff states that the contract was repudiated before the passage of the charter of the Traction Company, and that the Board of Aldermen were informed of the repudiation and of his claim under it by his card of 26th August, 1895. Then it follows that the Board of Aldermen and the Common Council determined, after knowing of his claim, not to put him among the corporators, but to entrust the enterprise to those inimical to him. Having so entrusted the franchise, a court of equity, even if empowered to enforce the previous contract, would be estopped from doing so, for plainly the Council, in granting the franchise, determined that the plaintiff should not be one of the corporators to whom they gave it. Should a court force a corporation to accept as a corporator, or stockholder, one whom the Legislature has excluded from the franchise? The bare statement of such a proposition shows its absurdity. *Chippewa R. R. v. Chicago, &c., Co.*, 6 L. R. A., 609; 75 Wis., 224. The plaintiff states (p. 11) that on the day after his contract with Sheild he wired his friends in Richmond to have his name inserted as corporator in the Traction ordinance, as proposed by Sheild. It was not so inserted. Why? There was no breach of contract pretended at that time. It must have been, therefore, that the Common Council, disgusted with the defendant's conduct in withdrawing a scheme they had approved, and combining with

promoters of the competing scheme, refused to allow his name to be inserted in the Traction ordinance.

We might well rest our argument here, but justice to our clients requires some notice of other grounds discussed by the learned counsel for the petitioner, as bearing on the jurisdiction of the court.

Quo Warranto Should Have Been Resorted to in the Attack upon the Corporation

The bills attack the organization of the Traction Company, and charge a misuse of the franchise granted it.

We would refer the court to Chapter 145 of the Code of Virginia, 1887, commencing with Section 3022, wherein the proceeding by writ of *quo warranto* is provided in cases against corporations for a misuse of their corporate privileges and franchises, or for the exercise of privileges or franchises not conferred upon them by law, and against persons for the misuse of any privilege conferred upon them by law, or for acting as corporations without authority of law.

Here is a plain remedy at law provided by the sovereign power, whence issue all franchises, to enquire into their exercise, and to declare forfeiture where improperly exercised.

This direct proceeding which might have been had at the instance of the appellant, under the provisions of said chapter, should have been had before he had a right to come into chancery, for the fact of forfeiture cannot be enquired into collaterally, unless the proceeding by *quo warranto* be first had.

This was expressly held in—

Crimp v. U. S. Mining Co., 7 Gratt. (Va.), 352.

See also—

Banks v. Poitauz, 3 Rand. (Va.) 136.

Pisley v. Roanoke Nar. Co., 75 Va., 320.

National Bank v. Mathews, 98 U. S., 621.

National Bank v. Whitney, 103 U. S., 99.

Reynolds v. Crawfordsville Bank, 112 U. S., 405.

Without having resorted to their writ of *quo warranto*, the

appellant, by his amended bills, attacks the validity of the Act of Assembly under which the defendant company was incorporated (page 107); attacks the organization of the company and the issuance of stock (pages 100 and 101); attacks the act of the corporation in borrowing money and giving securities therefor (page 103), and thus attempts collaterally to bring in question the most important acts of the corporation and those comprising it, claiming that they are in the exercise of privileges not conferred by law.

Upon the setting aside of these acts the appellant rests his right to relief in the case (p. 111), and therefore his bill is fatally defective.

Charter Act and Code of Virginia.

In order to obtain equity jurisdiction, the appellant has attacked the issue of the bonds of the Traction Company as illegal, charging that the Act of Assembly of the 20th of March, 1860, in so far as it authorized their issue, was void, because the said provision was not embraced in the title, and because under section 1232 of the Code of Virginia the Company was prohibited from borrowing money until its capital stock was paid in and expended. As regards the said Act of Assembly, it is sufficient to say that its title being, "to authorize the Common Council to authorize persons to construct railroads in the streets of the said city," all provisions of the act which embraced "objects connected with and in furtherance of the main general object of the act" come within the title.

Powell v. Supervisors of Brunswick County, 88 Va. 707-714.
Thompson Com. on Corporations, sec. 608, *et seq.*

In order that the said street railroad might be constructed it was proper that the contractors be made a corporation; such work was usually done by corporations; and as it was proper to make them a corporation, it would of necessity be subject to the laws relating to corporations. It was accordingly placed under the two chapters of the Code of Virginia relating to

such bodies, and the provisions of the act complained of are but modification of those provisions.

It is but proper to say that this question has been raised upon this charter in other suits, and has been decided in favor of the Company, both by the Circuit Court of Henrico County, and by the Judges of the Virginia Court of Appeals, who have refused to enjoin the company in its work on that ground.

As to the section in the Code of Virginia, it will appear upon its face, that where the Company was expressly authorized by its charter, it could borrow money without first expending subscription to capital stock; and by the 5th section of the said Act of the 20th of March, 1860, which is the charter of the Traction Company, it was especially authorized at "*any time* to borrow money for the purpose of building, equipping, and extending their roads, and issue bonds therefor, bearing interest not exceeding eight per centum per annum, and may secure the same by a deed of trust or mortgage upon the whole *or any portion of their property.*" This provision, it will be seen, authorized the Company to embrace in its mortgages, its property other than claims against the stockholders.

This provision of the mortgage, is declared by the appellant to be a fraud on him, although if he be entitled to be a stockholder, as he claims, it relieves him of personal liability.

And so also, the attempt to get equity jurisdiction by the charge that the stock subscriptions were made without due advertisement, is futile. By the 4th section of the said act, the corporators were authorized "to open subscription for such *time and on such advertisement as may seem best to them.*"

It will also be seen by section 1106 of the Code of Virginia, relied on by the appellant, that the thirty days' notice there required is only where the Act of Assembly incorporating the company also appoints commissioners to receive subscriptions to the capital stock. These commissioners were persons other than the corporators, and by section 1112 the corporation had

no existence until the subscribers received by the commissioner shall have met in general meeting.

None of these provisions apply to the charter of the Traction Company, in which no commissioners were appointed to organize the company, but it was incorporated the moment the Mayor signed the ordinance, and the incorporators were authorized to receive the subscriptions. So no notice of opening the books was required in this case. None is required by the general law of corporations, and none by the act of incorporation, but the matter is left to the discretion of the incorporators. Had the provision of the Code applied, there could have been no organization of the company within the ten days required by the ordinance, as the Code requires thirty days notice of time and place of subscription to stock.

Upon the whole case we ask that the decree of the United States Circuit Court of Appeals for the Fourth Circuit be affirmed, without the permission to seek relief in a court of law.

W. W. HENRY,
E. R. WILLIAMS,
S. D. SCHMUCKER,
GEORGE WHITELOCK,

Counsel for

THE RICHMOND TRACTION COMPANY,
MARYLAND TRUST COMPANY,
JOHN L. WILLIAMS,
JOHN S. WILLIAMS,
EVERETT WADDEY,
RO. LANCASTER WILLIAMS,
WM. M. HABLSTON,
JOHN W. MIDDENDORF,
H. A. PARR,

of the Appellees.

APPENDIX.

AN ACT

TO AUTHORIZE THE COMMON COUNCIL OF RICHMOND TO AUTHORIZE PERSONS TO CONSTRUCT RAILROADS IN THE STREETS OF SAID CITY.

[Passed March 20, 1860.]

1. *Be it enacted by the General Assembly,* That the Common Council of the city of Richmond shall have the power to authorize any person or companies to construct railroads in the streets of the city of Richmond under such provisions, restrictions and limitations as the Council may prescribe; and when such persons or companies are so authorized to construct such railroads, the said persons or companies, with such persons as may unite with them, shall be a corporation, with the powers and duties, and for the time prescribed and authorized by their agreement with the said Council, and shall be governed by the provisions of chapters 56 and 57 of the Code, so far as the same are applicable to such corporations and not inconsistent with this act; provided, that the mere grant of authority to one such company shall not prevent the Council from authorizing other persons or companies to construct other such railroads in the streets of the city.

2. Any persons or companies authorized by the Council to construct such railroads, may, with the consent of the County Court of Henrico, extend their road or roads into the county of Henrico any distance not exceeding ten miles, and may use steam as their motive power outside the corporate limits of the city; provided, that in constructing their road within the limits of the city the same shall be done on the line and under such restrictions as the Council may prescribe.

3. The company or companies so constituted may pur-

chase, lease, hold, sell, and convey, lease out and rent out real estate, not exceeding at any one time five acres in the city of Richmond, not more than one acre of which shall be in one body, and five hundred acres in the county of Henrico.

4. The capital stock of any such company shall not be less than twenty thousand dollars, nor more than three hundred thousand dollars, to be divided into shares of fifty dollars each. The corporators in any such companies, or the majority of them, may cause books of subscription to the stock of such company to be opened at such places in the city of Richmond, for such time, and on such advertisement, as may seem best to them; and the stockholders, in general meeting, may prescribe the officers of such company and their respective duties, the number of directors, and the votes to which stockholders shall be entitled.

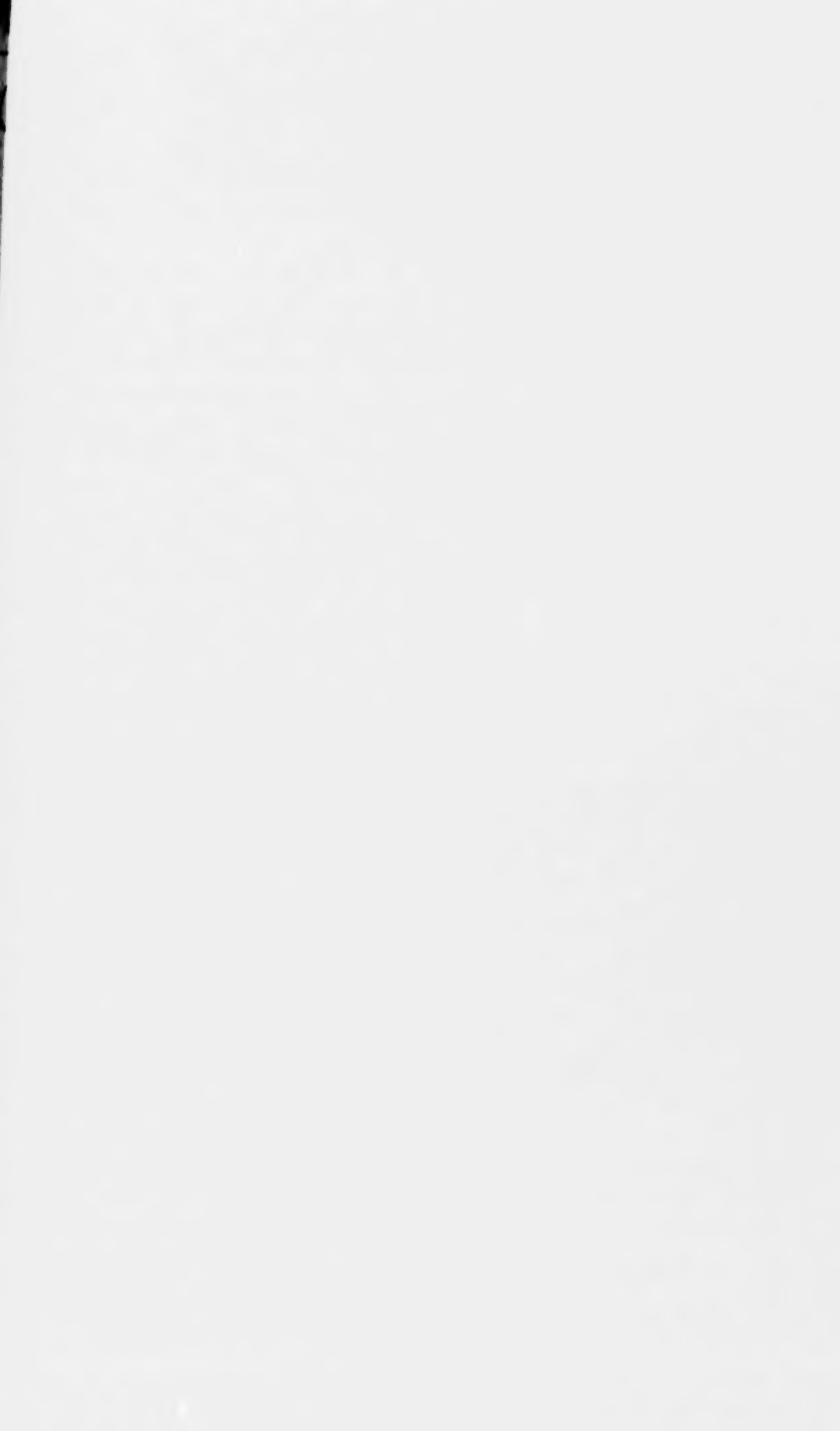
5. The said company or companies may at any time borrow money for the purpose of building, equipping or extending their roads, and issue bonds therefor, bearing interest not exceeding eight per centum per annum, and may secure the same by a deed of trust or mortgage upon the whole or any portion of their property.

6. This act shall be in force from its passage.

Copy—teste :

P. H. GIBSON,

*Clerk of House of Delegates and
Keeper of the Rolls of Va.*



HYER *v.* RICHMOND TRACTION COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 379. Submitted October 18, 1897. -- Decided December 6, 1897.

Hyer and Shield were engaged separately, each on behalf of himself and his associates, in seeking from the city government of Richmond a concession for a street railway with collateral lines. Hyer's organization was to be called the Richmond Conduit Company, and Shield's the Richmond Traction Company. Hyer made a deposit of money in a bank in Richmond to aid in his projects. Hyer and Shield then contracted in writing as follows, each being fully authorized thereto by his associates: "We

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hereby bind ourselves, in our own behalf and for our associates, mutually to coöperate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise. The deposit already made with the State Bank of Richmond, by Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system." A full statement of the action of the two companies was made to the Richmond authorities. Hyer fully performed his agreements. He was unable to go to Richmond when the matter was settled, and Shield secured the concession for himself and his associates, and refused to permit Hyer and his associates to participate in it. By bill in equity, amended bill and supplemental bill, Hyer sought to be declared owner of one half interest in the Traction Company's franchise, property and stock, and for a decree securing the possession and enjoyment thereof. *Held*, that, without deciding whether the contract sued on was, under the facts and circumstances disclosed, void as against public policy, the case presented was not one which called for the interposition of a court of equity; but that the plaintiff's remedy was by an action at law.

On October 30, 1895, appellant, as plaintiff, filed his bill against the defendants in the Circuit Court of the United States for the Eastern District of Virginia. After some changes, he, on April 18, 1896, filed an amended and supplemental bill. The sufficiency of this was challenged by demurrer. The demurrer was sustained, and on August 22 a decree was entered dismissing the bill. From that decree the plaintiff appealed to the Court of Appeals, which court, on May 14, 1897, ordered that the decree of the Circuit Court be affirmed, without prejudice. Whereupon the case was removed to this court by certiorari.

It appears from the allegations in the amended and supplemental bill that the plaintiff, whose attention had been for some time devoted to the matter of street railways in the city of Richmond, Virginia, succeeded in obtaining from the city council a franchise for the construction and operation of a

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street railway on Broad street, in that city. An ordinance, passed on June 17, granted the franchise to the plaintiff and his associates under the name and style of the Richmond Conduit Company. The terms of this ordinance differed in some respects from those of the one prepared by the plaintiff, who declined to accept it or to proceed under it in the form in which it had passed the council. But upon an open conference with the committee on streets of the city council plaintiff was assured that changes would be made rendering the franchise acceptable to him, provided he would deposit in one of the banks of the city of Richmond the sum of ten thousand dollars, upon certain conditions embodied in a paper, prepared by the city attorney. On July 17 he caused the deposit to be made, and gave satisfactory guarantees of the good faith of himself and associates, and of their purpose to construct the railway, which guarantees, as he was assured, would secure the modification of the grant in accordance with his suggestions. While in Richmond, and conferring with the various committees of the city council with regard to this franchise, he became aware that certain other parties were seeking to secure a grant of a like franchise to them, under the name and style of the Richmond Traction Company, and that the defendant, P. B. Shield, was apparently the head of this movement, but he had not been successful in obtaining the passage of any ordinance by the city council. In the early part of August, 1895, the plaintiff went to the city of New York, to make arrangements for constructing the railway as soon as the amendments had been made to the ordinance. While there he was in the banking house of Stewart & Co., who had been advising with him with a view of aiding him financially in the prosecution of his enterprise, and there ascertained that the defendant Shield was also in conference with the said firm of Stewart & Co., seeking aid in the prosecution of his Richmond Traction Company scheme. Stewart & Co. advised the consolidation of the two interests, to wit, the interest of plaintiff and his associates in the Conduit Company with that of Shield and his associates in the Traction Company. After some conferences a contract was entered into between plaintiff and Shield, which took the

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form of a joint letter to the banker, of which the following is a copy :

“ NEW YORK, *August 9th*, 1895.

“ S. H. G. Stewart, Esq., 40 Wall street, city.

“ DEAR SIR: We, the undersigned, L. H. Hyer, of Washington, D.C., and Phil. B. Shield, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to coöperate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

“ It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

“ Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

“ Yours very respectfully,

“ (Signed) L. H. HYER.

“ (Signed) PHIL. B. SHIELD.

Plaintiff was authorized to act for himself and associates, and the defendant Shield represented that he had a power of

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attorney from all parties interested in the traction company scheme, and he did actually represent them.

It was agreed between the parties to this contract that a full statement and explanation of the action of the two companies should be made to the city authorities of Richmond, and in fact it was so made. Plaintiff fully performed all the promises and covenants entered into in said contract in behalf of himself and his associates, but being detained by a serious illness was unable to proceed immediately to Richmond, and trusted to the defendant Shield and his associates to carry out other terms of the contract and secure the franchise for the mutual benefit of both interests. Disregarding this contract, Shield and his associates secured the passage of an ordinance granting the franchise to them, and wholly ignoring plaintiff and his associates. The first section of this ordinance provides: "That the Richmond Traction Company, composed of John W. Middendorf, John L. Williams, Everett Waddey, Reuben Sherreffs, Philip B. Shield, Charles T. Child and W. F. Jenkins, be, and the same is hereby, permitted to construct and operate a street railway within the limits of the city, along the following routes, under and subject to the conditions and provisions hereinafter set forth: A double track in Broad street," etc. Subsequent sections cast various obligations upon the company in respect to the construction and operation of the railway, the use by other companies of the tracks, and the payment of a certain per cent of the gross receipts into the treasury of the city. The last section is as follows:

"Fourteenth. Said Richmond Traction Company, and all such persons as now compose said company, or who may hereafter unite with them, are, in virtue of the authority vested in the common council of Richmond, pursuant to the act of the General Assembly of Virginia, passed March 20, 1860, entitled 'An act to authorize the common council of Richmond to authorize persons to construct railroads in the streets of said city,' declared to be a corporation, and are vested with all the rights and privileges conferred, or intended to be conferred, by said act on persons or companies authorized by said council of the city of Richmond to construct railroads in the streets of said

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city, and are likewise bound by all the restrictions of said act."

All the parties named in the first section of this ordinance were duly notified of the claims of plaintiff and his associates, under the contract of August 9: notwithstanding which they ignored plaintiff and his associates, and proceeded to organize a corporation, taking all the stock to themselves, paying nothing therefor, but receiving certificates purporting to be of fully paid stock. Plaintiff, after alleging that he is the holder of all the interests represented by himself and his associates, prayed that he be decreed the owner of one-half interest in the Traction Company's franchise, property and stock, and specifically for certain orders to secure to him the possession and enjoyment of such interest.

Mr. Robert Stiles and Mr. Addison L. Holladay for Hyer.

Mr. W. W. Henry, Mr. Edmund Randolph Williams, Mr. S. D. Schmucker and Mr. George Whitelock for the Richmond Traction Company.

MR. JUSTICE BREWER after stating the case, delivered the opinion of the court.

Two questions arise in this case: First, whether the contract sued on is, under the facts and circumstances disclosed in the bill, void as against public policy; and, if not, whether the case presented is one which calls for the interposition of a court of equity, or should be determined in a court of law.

In respect to the first question, it will be borne in mind that upon a demurrer, whatever the facts in the case may really be, we must take them to be as stated in the bill. So, in determining the question of the validity of this contract it must be assumed that there was no concealment; that everything was open and public; and nothing withheld from the knowledge of the city council, or any parties interested in the matter. The case thus presented is: Two parties apply separately to a city council for a franchise to construct a street railway. The banker from whom each of the parties is seeking

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financial assistance advises them to unite and make a single application. They do so, and thereafter the city council, aware of both interests, of the two applications, of the advice to consolidate and the party by whom it is given, and of all the terms of the consolidation, grants the franchise to only one of the parties. Was the agreement to unite in one application against public policy and void?

In the view we have taken of the second of these questions it is unnecessary to definitely determine the answer which should be given to the first, though it may not be inappropriate to observe that the vice which is so frequently detected in contracts and agreements of a similar nature lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse but in fact friendly source. It would scarcely be doubted that two or more parties may properly unite in a partnership or corporation and thus unitedly make, in the name of the partnership or corporation, a single application for a grant or franchise; and, if they may so unite before any application, it is not easy to see why they may not so unite after having once made separate applications, providing all the facts and circumstances are fully disclosed and the public and the public authorities act upon full knowledge; and if they may sometimes so unite, an agreement for uniting is not necessarily void. As said by the New York Court of Appeals in *Atcheson v. Mallon*, 43 N. Y. 147, 151: "A joint proposal, the result of honest coöperation though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed and not secret. The risk as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid."

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See also *Smith v. Greenlee*, 2 Dev. (Law,) 126; *Phippen v. Stickney*, 3 Met. 384; Greenwood on Public Policy, p. 190, Rule 177.

It may be noticed that there is nothing in the agreement, reduced to writing, or as interpreted by the facts stated, which tends to show any thought or purpose of using corrupt or improper influences to secure the action of the city council. So that, upon the record as it stands, the question is, narrowly, whether any agreement to unite between parties who have applied, or contemplate application, for a franchise is under all circumstances necessarily void as against public policy.

The case is also easily distinguishable from those of contracts merely to abstain from bidding. An agreement not to bid tends to diminish the number of bidders, and thus *prima facie* to lessen the probable profitableness of the sale or contract. Yet, even in cases of public sales, the rule laid down by this court is that agreements to unite in a bidding are not necessarily void. Some other element than the mere fact of union must exist before the agreement is to be condemned. *Kearney v. Taylor*, 15 How. 494. In that case, at a public sale a portion of a farm was purchased by a company, organized pending the sale and making the purchase with the view of laying out and establishing a town thereon. After discussing the question of competition, and the reasons which had led courts to frequently denounce such combinations for the purpose of bidding, the opinion adds, (p. 520):

"These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders.

"We must, therefore, look beyond the mere fact of an as-

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sociation of persons formed for the purpose of bidding at this sale, as it may be not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it; and if, upon such examination, it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it, to participate in the biddings, the sale should be upheld — otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the property at a sacrifice.

“Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each.”

The observations thus made show that every case must be determined upon its peculiar facts and circumstances, and the courts, before condemning an agreement to unite in a bid, must see that the agreement is such as really destroys the value of competitive bidding; and these observations, it must be noticed, were made in respect to a case in which a public sale had been ordered. The sale was, therefore, something which must take place, and the question of making a sale was not discretionary with the sheriff or other officer charged with the duty of making the sale. But here the city of Richmond was not bound to grant any franchise. It was free to determine whether it would grant or not, and, if it did, what form of street transportation should be adopted, and might also well consider the character, the financial ability and the situation of the various applicants in determining to whom it would be best for the public interests to grant such a franchise.

Where the grantor or vendor has not determined the question of grant or sale, and it is still a matter of discretion whether the grant or sale shall be made, it would seem that there were less cogent reasons for denouncing a combination or agreement of parties with a view of making a proposal. *Morrison v. Darling*, 47 Vermont, 67, 72. In that case it appeared that two parties each contemplated purchasing property belonging to a third. One of the two promised the other a certain sum if he would not interfere with him in

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obtaining the property and would assist him in making the purchase. It was held that the agreement was valid. The court, after referring to the rule pertaining to the cases of public sales, said: "But in this case the owner of the share of the estate was under no obligation to sell to any one; and there was no stipulation to resort to any illegal or improper means to mislead the owner, or to induce a sale by any fraud or artifice. We do not think such a contract can be held void as against public policy."

But, as observed, every case must depend upon its own circumstances, and it may be that when the facts in this case are disclosed by the testimony they will be found to differ materially from those stated in the bill. Inasmuch as we are of the opinion that, even if the contract be valid, the plaintiff's remedy is in a court of law rather than in a court of equity, it is not wise to attempt to definitely determine whether, under the circumstances stated, this contract was or was not void as against public policy, for such determination might prove to be, in the final result, the mere answer to a moot question. It will be more satisfactory to pass upon the question when the surrounding facts are fully developed by testimony.

We pass, therefore, to the second question, which is: Assuming this contract to be valid, was the plaintiff's remedy in equity or at law? According to the allegations, the city council was aware of the two parties, of their agreement to unite in one application, of all the facts surrounding the agreement and proposed union, and with such knowledge it granted this public franchise to one party alone. In the exercise of its judgment in respect to the public interests, the city council determined that it was better that the defendants should have this franchise than that the united parties should have it. In the face of this determination by the authorities having special charge of the public interests, and ignorant as we must be of the reasons which controlled the city council in making this award to the one singly rather than to the two jointly, it would be improper for a court of equity to compel a consolidation of those interests. For reasons which must be held to be

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sufficient and controlling, the city council deemed it not wise to grant this franchise to the two, but gave it to the one. Shall the courts overrule this determination, and entrust the franchise to the two rather than to the one? They have no general supervision over the judgment and action of public authorities. The city holds its grantee responsible for the proper discharge of the duties imposed by its grant of the franchise. It may well have determined that it did not desire the plaintiff to have any interest in it, or anything to do with the management of the street railway, and that the best interests of the city would be subserved by committing it, primarily at least, to the defendants alone. Shall the courts say that such determination was erroneous, or may be overruled simply because of a private contract between the two parties? It must be remembered that according to the allegations the city council knew of the union of interests, and yet declined to recognize such union. It may be said that by authorizing these defendants to incorporate, it put it in their power to let the plaintiff and his associates or any one else into the enterprise. Of course, the city council knew that the franchise when granted could be alienated by the grantees, and yet notwithstanding this possible alienation the fact remains that the city council determined that the primary parties to receive the franchise—the ones upon whom the burden of the contract should be laid—were the defendants alone, and not in conjunction with the plaintiff or his associates.

It is obvious that if two interests, which it may be believed are now not in harmony, if not decidedly antagonistic, are let into equal control of a franchise, such as this, the public interests may suffer. Harmony in management is no inconsiderable factor in securing the best possible results, and if the parties in interest are of two minds as to how the railway shall be managed, what improvements shall be made, and, in general, what shall be done in connection therewith, it is not difficult to perceive that their antagonism may prevent that efficiency which will tend to make the street railway of the greatest advantage to the public.

This conclusion, while not interfering with the right of the

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plaintiff to maintain his action at law for the damages resulting from the defendants' breach of contract, at the same time preserves the city's control over the franchise, and upholds its determination as to the party or parties to whom it is willing to entrust such franchise.

But beyond these relations of the public to the enterprise, courts are not often wont to compel parties to unite interests and work together. And here it may be well to notice that the contract was not one in terms for a partnership in the management of the railway, but only one for a division of the profits. The parties stipulated to coöperate in securing the franchise and to divide equally the profits, but left the question of control and management unsettled. The application, it is true, was to be in the name of the Richmond Traction Company, but who should compose that company was, according to the last clause of the contract, to be subsequently determined. It may, however, be conceded that there is an implication of joint ownership as well as of joint interest in the management, and in the profits arising therefrom, and thus it may be said that the contract was really one for a partnership. It is seldom that a court of equity will decree that a partnership which has been agreed upon shall be carried into effect. More frequently it is called upon to release parties from partnership agreements on the ground that their antagonism prevents the fulfilment of the purposes of the partnership, and it would seem like a contradiction to force antagonistic parties to form a partnership when it is one of the recognized rules of equity that such antagonism is ground for dissolving a partnership already existing. It is true that the ordinance contemplates the formation of a corporation, and courts will sometimes decree the specific performance of a contract for the transfer of stock. But the ordinance was passed after the contract, and, as we have seen, the most that can be said of the contract is that it contemplated the creation of a partnership. The fact that thereafter the city council deemed it best to provide by ordinance that the grantees of the franchise should incorporate does not change the scope of the contract. It is precisely the same that it would have been

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if the council had granted the franchise to Shield personally, and authorized him as an individual to construct and operate the railway. How then can it be said that this contract is to be deemed one for the transfer of shares of stock in a corporation? No corporation then existed. The Richmond Traction Company, in whose name the application was to be made, was not then a corporation and became one only on the passage of the ordinance. There was no certainty that one would ever be formed; there was no agreement that one should be formed, and the rights of the parties must be determined by the facts as they were at the time of the contract and the terms which entered into it. But even if it be considered as a contract specifically for the transfer of stock, what is the rule in respect to actions in case of a breach thereof? If stock has a recognized market value, courts will ordinarily leave the parties to their action at law for damages for breach of the agreement to sell, but in cases where the stock has no recognized market value, is not purchasable in the market, or has a value which is not settled, but is contingent upon the future workings of the corporation, equity will sometimes decree specific performance of a contract of purchase. It is in reliance upon this that plaintiff claims the right to a decree for specific performance. The enterprise, he says, is a new one; it is difficult to put a fair pecuniary value on the stock or on the franchise. It is one of those things contingent largely on the successful working of the railway. It must be conceded that there is force in the contention that only by letting the plaintiff into the possession of the interest he claims, can adequate compensation be secured. At the same time the present value of the franchise, and therefore of the stock of the corporation owning the franchise, is not wholly beyond estimate. That which it may have three or four years hence may depend largely upon the matter of management. But it is a franchise which has definite possibilities. The miles of track covered by it, the population adjacent to the line, and, therefore, the number of people likely to avail themselves of its advantages, the cost of construction and of operation, are all well-known facts, and upon such known facts it is not

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impossible for a jury to form a fair estimate of the value of the franchise, and, therefore, of the damage which the plaintiff has sustained by the repudiation of the contract to give him a half interest in it.

The authorities generally support these views. In Pomeroy's Specific Performance of Contracts, § 290, the author, citing several cases, says: "It is well settled, as a general rule, that an agreement to enter into a partnership which would be literally performed by executing the partnership articles, or to carry on a partnership already established, will not be specifically enforced."

In *Hill v. Palmer*, 56 Wisconsin, 123, 129, the court observes:

"It is also well settled that the wrongful refusal by a party to a contract of copartnership to permit the firm to commence business, or, as it is sometimes termed, to *launch* the partnership business, is ground for an action at law by the injured partner to recover damages of the partner whose wrongful act has defeated the purposes for which the copartnership was formed. The cases which so hold, both in England and this country, are very numerous. Indeed, the authorities seem to be quite uniform in so holding. The following are a few of the cases referred to: *Venning v. Leckie*, 13 East Term R. 7; *Gale v. Leckie*, 2 Stark. 107; *Manning v. Wadsworth*, 4 Md. 59; *Glover v. Tuck*, 24 Wend. 153; *Bagley v. Smith*, 10 N. Y. 489; *Terrill v. Richards*, 1 Nott & McC. 20; *Ellison v. Chapman*, 7 Blackf. 224; *Williams v. Henshaw*, 11 Pick. 79; *Addams v. Totten*, 39 Pa. St. 447; *Vance v. Blair*, 18 Ohio, 532; 1 Story's Eq. Jur. sec. 665; Collyer on Part. sec. 245; 2 Lindley on part. (4th ed.) 1025, and cases cited in notes."

Powell v. Maguire, 43 California, 11, disclosed, like the case at bar, an agreement in respect to a franchise to be obtained from the legislature for the mutual benefit of plaintiff and defendant. The franchise in that case was for maintaining a steam ferry, and it appeared that the defendant, after obtaining the franchise in his own name, constructed a ferryboat at his own expense, and operated it between the points named in the charter. The suit was one to obtain

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specific performance of the agreement, and it was held that it could not be maintained, the court saying, on page 19:

“Upon these facts it is obvious that if the plaintiff's rights rested solely on a verbal agreement, to the effect that he and the defendant would establish and maintain the ferry at their joint expense, and for their joint benefit, without reference to the franchise, the plaintiff's only remedy would be an action at law for a breach of contract. He would have no right to participate in the profits of an enterprise to which he had contributed nothing, and could claim no interest in a boat constructed by the defendant, at his own expense, and for his own use, nor in the earnings thereof. In such cases it is well settled that, when the partnership was never launched, and when one of the copartners has proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other party therefrom, and repudiating the partnership agreement, the only remedy of the injured party is an action at law for a breach of contract. There would be in such a case, no existing partnership, but only an agreement to form one, which was never consummated by launching the enterprise.”

In that case, also, it was held that the contract was against public policy, the facts in respect to the contract not having been disclosed to the legislature at the time the franchise was granted. In respect to this it was said (p. 21):

“When the legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the person thereafter to be associated with him in the enterprise. . . . But if several persons desiring to obtain a franchise from the legislature, in which they are all to be mutually interested, see fit to ask it in the name of one only, public policy requires that they should be made to rely solely on his good faith in carrying out the agreement; and if he repudiates the contract on obtaining the franchise a court of equity will grant no relief. It may be that, if the legislature had known beforehand who the real parties in interest were, they would not have made the grant; and if the courts could be appealed to, to enforce such secret ante-

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cedent agreements, unsupported by any subsequent acts of the ostensible beneficiary, it is evident that powerful secret combinations would be formed to procure vicious legislation under false pretences."

These authorities might be multiplied, but they are sufficient to show the general rule controlling actions of this kind. For these reasons and upon these authorities we are of the opinion that the suit for specific performance cannot be maintained.

The decree of the Circuit Court was one dismissing the bill absolutely. In view of the doubt which rests as to the validity of the contract we think it should have been a dismissal without prejudice, and the order will be, therefore, that the case be remanded to the Circuit Court with directions to modify the decree so as to make it one dismissing the bill without prejudice to an action at law.

MR. JUSTICE HARLAN, concurring.

I am of opinion that the object as well as the effect of the contract set out in the bill was to diminish competition in reference to the obtaining of a public franchise. For that reason it was detrimental to the public interests, and one in respect of which a court of equity ought not to give any aid to either party. In addition to this view, it appears upon the face of the ordinance in question that the city council of Richmond named the persons by whom that franchise was to be exercised; and a court of equity ought not to force another party into connection with those whom the city council thus designated. Aside from these considerations, I am of opinion that if the plaintiff has any remedy at all, he has an adequate one at law. Upon this last ground I acquiesce in the judgment of the majority of the court in this case.

MR. JUSTICE BROWN, with whom concurred MR. JUSTICE PECKHAM, dissenting.

MR. JUSTICE PECKHAM and myself are unable to concur in that part of the opinion of the court which holds that the

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complainant is not entitled to relief in equity. Neither the agreement between Hyer and Shield of August 9, 1895, nor the negotiations of these parties with the common council of the city of Richmond, contemplated or implied a partnership between them. Not only is it a fact of which we may take notice that street railways are universally constructed and operated by corporations, but it was one of the stipulations of the agreement of August 9, 1895, that "the application and franchise to be presented to the common council of the city of Richmond" should "be that of the Richmond Traction Company for the building of an overhead trolley or cable railway system." The franchise of June 17, 1895, was granted by an ordinance of this council to Hyer and his associates under the corporate name of the "Richmond Conduit Railway Company," while the rival competing scheme of Shield was applied for under the name and style of the "Richmond Traction Company." Not only must the common council have understood that it was contracting with a corporation, but there is nothing to show that it placed any special reliance upon the personal qualities of Shield or his associates. Indeed, the facts set forth in the bill in this connection show conclusively there could have been no such reliance.

While the entire stock of the Richmond Traction Company may have been taken in their names, there was nothing to prevent that stock from being transferred at any time to other parties; nor could the city have had any personal claim against Shield or his associates. The transaction was with the corporation, and with the corporation alone, and in a legal point of view it was a matter of entire indifference to the city who became the owners of the stock. The entire stock of the company might have been transferred to other parties the day after the charter was granted without any violation of its provisions. In fact, the common council is alleged to have understood that the interests of the two companies had been consolidated, and granted the charter to the Traction Company, with knowledge that Hyer and his associates were to participate equally in the enterprise.

Under such circumstances, we think it clear that the court

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should have entertained a bill for the specific performance of this contract, and not have relegated the parties to the doubtful and unsatisfactory remedy of an action at law. We understand the rule to be, as stated by Cook on Stock and Stockholders, section 338, that "if the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance, and compel the vendor to deliver the stock."

This principle is particularly applicable to a case of this kind, where the corporation was but recently formed, the railroad yet unconstructed, and its shares of uncertain value — if indeed they had any market value at all. To require the complainant, under these circumstances, to bring a personal action for a breach of contract against Shield, who is alleged to be hopelessly insolvent and wholly unable to respond in damages, is to offer him the shadow and deny him the substance of relief.
